164-684

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 497.

JOHN F. BUSHNELL, PLAINTIFF IN ERROR,

vs.

CYRUS A. LELAND, RECEIVER OF THE STATE NATIONAL BANK OF WICHITA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED APRIL 21, 1896.

(16,263)

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INDEX.

	Original.	Print.
Caption	1	1
Complaint	2	1
Marshal's return	6	3
Schedule C—Assessment order	7	4
Appearance entered	9	5
Answer	10	5
Amendment to complaint	12	6
Answer to amendment to complaint	15	8
Order beginning trial	16	8
Verdict	17	9
Judgment	17	9
Bill of exceptions	18	9
Appointment of receiver	19	9
Assessment order	19	10
Notice of assessment	21	11

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	Original.	Print.
Motion for verdict for defendant (overruled)	22	11
Motion for verdict for plaintiff (granted)	23	12
Judge's certificate to bill of exceptions	23	12
Stipulation as to bill of exceptions	23	12
Petition for writ of error	24	13
Assignment of errors	25	13
Order allowing writ of error	26	14
Bond on writ of error	27	14
Writ of error	30	16
Citation	31	16
Acceptance of service of citation	32	17
Clerk's certificate	33	17

1 District Court of the United States for the District of Connecticut.

CYRUS A. LELAND, Receiver,
vs.
JOHN F. BUSHNELL.

TRANSCRIPT OF RECORD.

2 *The Return of the Judges of the District Court of the United States for the District of Connecticut to the Foregoing Writ.*

The record, proceedings, and judgment whereof mention is therein made follow in these words and figures, viz:

CYRUS A. LELAND, Receiver,
vs.
JOHN F. BUSHNELL.

Be it remembered that on the 29th day of March, 1895, John F. Bushnell, of the town of Old Saybrook, in the State of Connecticut and in the district of Connecticut, was attached and summoned to appear before the district court of the United States, to be holden in and for the district of Connecticut, in the city of Hartford, in said district, on the fourth Tuesday of May, A. D. 1895, then and there to answer unto Cyrus A. Leland, of Wichita, in the State of Kansas, as receiver of "the State National Bank of Wichita," in a civil action, wherein the plaintiff complains and says:

1. That the "State National Bank of Wichita," Kansas, heretofore and prior to the acts herein mentioned was duly organized as a national bank or banking association under and by virtue of the act of Congress entitled "An act to provide a national currency secured by pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, and thereupon said "State National Bank of Wichita" proceeded and for a long time continued to issue currency and receive deposits of money and discount negotiable paper and generally to transact the business of a national bank, as authorized by act of Congress, and

3 that in its said business it contracted prior to the 7th day of May, 1894, large debts and liabilities, and on or about that day it failed and suspended payments; that on that day it also failed and refused to pay one of its circulating notes and made default to redeem the same in lawful money of the United States; all of which was duly certified and reported to the Comptroller of Currency of the United States, as provided by law.

2. That the said Comptroller of Currency, upon being duly satisfied according to law that said bank had failed and suspended payment and had failed and refused to pay one of its circulating notes and had made default to redeem the same in lawful money of the United States, thereupon appointed the plaintiff receiver of all the

property, books, records, and assets of said "State National Bank of Wichita," and the plaintiff accepted such appointment and duly qualified as such receiver and executed such bond with such surety as was required by law.

3. That thereupon the plaintiff, under the direction of the said comptroller, took possession of the books, records, and assets of every description of said "State National Bank of Wichita," and he has ever since been and now is engaged in collecting and converting the assets thereof and discharging in other respects the lawful duties of such receivership.

4. The plaintiff further avers that the property and assets of said bank are entirely insufficient to pay and satisfy its debts and liabilities, and in order to provide for paying the same it is necessary to enforce the personal liabilities of the stockholders, as provided and imposed by said act of Congress.

5. The plaintiff further avers that the said Comptroller of the Currency has ascertained and determined that the assets and credits of said bank are insufficient to pay its debts and liabilities,
4 and that it is necessary, in order to pay the same, to enforce the individual liability of the stockholders of said association as provided by the acts of Congress, and especially as prescribed in section- 5151 and 5234 of the Revised Statutes of the United States, and the said comptroller, by virtue of the power and authority for that purpose conferred upon and vested upon him by law, has therefore ordered and made an assessment and requisition upon the shareholders of the said "The State National Bank of Wichita," which shareholders included the defendant in this action, for one hundred thousand dollars, to be paid by them, ratably, on or before the 19th day of December, A. D. 1894, and upon each and every one of said shareholders, including the defendant in this action, the sum of one hundred dollars upon each and every share of the capital stock of said banking association held or owned by them respectively at the time of its failure, as more fully appears by a copy of the order making the same, which is hereto annexed and marked Schedule "C."

6. The plaintiff further shows that the said comptroller has made said assessment payable in two installments, to wit, fifty dollars per share on or before December 19th, A. D. 1894, and fifty dollars per share on or before January 19th, A. D. 1895.

7. The plaintiff further shows that the said comptroller has decided that it is now necessary to institute a suit or suits against said shareholders, including the defendant, to enforce their said liability, and has ordered the plaintiff to institute in the proper court or courts such suit or suits as may be necessary to enforce against each and every shareholder of said banking association equally and ratably his or her personal liability as such shareholder in the manner and to the extent prescribed by said act of Congress.

5 8. The plaintiff further shows that, as he is informed and believes, and as also appears by the records of said banking association, the defendant, John F. Bushnell, of Old Saybrook, in the State of Connecticut and in the district of Connecticut, was at

the time of said suspension and failure of said banking association a shareholder of its capital stock to the amount of five shares, of the par value of one hundred dollars each and of the aggregate par value of five hundred dollars, and held or was entitled to hold in his possession or control the usual stock certificates as such shareholder.

9. The plaintiff avers and insists that by reason of the premises the defendant has become and now is indebted and liable to pay to the plaintiff, as such receiver, one hundred dollars upon or in respect to each and every of his said shares therein as held or owned by him — the time of the failure and suspension of said banking association, and which liability or indebtedness of the defendant amounts to the sum of five hundred dollars.

10. The plaintiff avers that the defendant, although often requested to pay the last-mentioned sum to him, has not paid the same or any part thereof, but has hitherto neglected and refused and still does neglect and refuse to pay the same. Wherefore the plaintiff prays judgment against the defendant for the sum of five hundred dollars, with interest thereon from the dates when the installments of said sum were due and payable, as hereinbefore alleged, together with the costs of this action, to recover which this suit is brought.

Frederick W. Holden, of Ansonia, is recognized in the sum of $140 to prosecute this suit to effect, etc.

Hereof fail not, but due service and return make.

6 Witness Hon. William K. Townsend, district judge, this 26th day of March, A. D. 1895, at Hartford, in said district.

E. E. MARVIN, *Clerk.*

CYRUS A. LELAND, *Receiver,*
By FREDERICK W. HOLDEN,
His Attorney.

UNITED STATES OF AMERICA, }
District of Connecticut. }

OLD SAYBROOK, *March 29th*, 1895.

Then and there, by virtue of the original writ and by direction of the plaintiff's attorney, I attached all the right, title, and interest of the within-named defendant in and to the following-described piece or parcel of land, situated in said town of Old Saybrook, together with all the buildings standing thereon, by lodging in the office of the town clerk, in said town of Old Saybrook, a certificate of attachment according to law, in which certificate is specified the court to which this writ is returnable, the parties hereto, the amount of damages claimed herein, the land bounded and described below which land is bounded northerly by the road leading to Saybrook, point, east by Maple avenue, south by land of William B. Tully and of I. S. Otis, and on the west by land of William J. Clarke, being the same premises deeded to said John F. Bushnell by Henry Potter and Maria H. Potter by deed dated the 11th day of November, 1867, and recorded in the land records of the town of Old Saybrook, Book —, Liber 1, page 571, and also by deed of Samuel L.

Hart, dated April 3rd, 1868, and recorded — same records, same liber, page 591.

And on the 29th day of March, A. D. 1895, I lodged in the office of the town clerk of said town of Old Saybrook a true and attested copy of this writ and complaint, with my doings endorsed thereon.

And on the 29th day of March, A. D. 1895, I left with the within-named defendant, at said town of Old Saybrook, a true and attested copy of this writ, with my doings endorsed thereon.

Attest: RICHARD C. MORRIS,
United States Marshal.

Fees.

Travel, 65 miles, @ 6c	3 90
Certificate of attachment	1 00
2 copies, @ $1.20	2 40
Service, 2 persons, @ $2	4 00
3 endorsements, @ 30c	90
Cash paid town clerk for recording attachment	40
	$12 60

7 SCHEDULE "C."

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *November* 19, 1894.

In the Matter of THE STATE NATIONAL BANK OF WICHITA, KANSAS.

To all whom it may concern:

Whereas upon a proper accounting by the receiver heretofore appointed to collect the assets of "the State National Bank of Wichita," Kansas, and upon a valuation of the uncollected assets remaining in its hands it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States:

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The State National Bank of Wichita" for one hundred thousand dollars, to be paid by them, ratably, on or before the nineteenth day of December, 1894, and I hereby make demand upon each and every one of them for one hundred dollars upon each and every share of the capital stock of said association held or owned by them respectively at the time of its failure, and I hereby direct Cyrus A. Leland, the receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof I have hereto set my hand and caused
8 my seal of office to be affixed to these presents, at the city of

Washington, in the District of Columbia, this nineteenth day of November, A. D. 1894.

{ Seal of the Comptroller of the Currency, Currency Bureau, Treasury Department. }

JAMES H. ECKELS,
Comptroller of the Currency.

9 And on the same day Frederick W. Holden, Esq., entered his appearance for the plaintiff, and on the 25th day of May, 1895, John J. Crawford, Esq., entered his appearance for the defendant.

And on the 26th day of June, 1895, defendant's answer was filed, in the words and figures following, viz:

10 District Court of the United States, District of Connecticut.

CYRUS A. LELAND, Receiver,
vs.
JOHN F. BUSHNELL.

Answer.

The above-named defendants, answering the complaint of the plaintiff herein, shows as follows:

He admits that the State National Bank of Wichita was duly organized as a national banking association, and for a long time continued to transact the business of a national bank, but he denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the first paragraph of the complaint, which are in the words and figures following: "And that in its said business it contracted, prior to the 7th day of May, 1894, large debts and liabilities, and on or about that day it failed and suspended payment; that on that day it also failed and refused to pay one of its circulating notes and made default to redeem the same in lawful money of the United States; all of which was duly certified and reported to the Comptroller of Currency of the United States, as provided by law."

He has no knowledge or information sufficient to form a belief as to any of the matters alleged in the second, third, fourth, fifth, sixth, and seventh paragraphs of the complaint.

He admits that he is the owner of five shares of the stock of the said State National Bank of Wichita, and that he owned the same on or about the seventh day of May, 1894, but this admission is not to be construed as an admission that the said bank suspended
11 and failed, and, so far as any such allegation is deemed to be made in the eighth paragraph of the complaint, he has no knowledge or information thereof sufficient to form a belief.

He denies each and all of the allegations contained in the ninth paragraph of the complaint.

He admits that he has not paid to the plaintiff the amount demanded of him by the plaintiff or any part thereof, but he denies

that there is now or was at the time of the commencement of this action anything due from him to the plaintiff on account of the matters and things alleged in the complaint.

And he denies that the plaintiff is or was at the time of the commencement of this action the receiver of the said State National Bank of Wichita.

JOHN F. BUSHNELL,
By JOHN J. CRAWFORD,
His Attorney.

And on the 27th day of August, 1895, amendment to complaint was filed in the words and figures following, viz:

12 District Court of the United States, District of Connecticut.

CYRUS A. LELAND, Receiver, *vs.* JOHN F. BUSHNELL. } Amendment to Complaint.

The plaintiff in the above-entitled action amends his complaint by adding after paragraph 10 therein the following, to wit:

Second count.

1. That the "State National Bank of Wichita," in the city of Wichita, county of Sedgwick and State of Kansas, heretofore and prior to the acts herein mentioned was duly organized as a national bank or banking association under and by virtue of act of Congress; and thereupon said "State National Bank of Wichita" proceeded and for a long time continued to issue currency, receive deposits of money, and discount negotiable paper, and generally to transact business of a national bank as authorized by act of Congress.

2. That said "State National Bank of Wichita" in its said business contracted, prior to the 7th day of May, 1894, large debts and liabilities, and that on or about that day it failed and suspended payment and became and was insolvent and unable to pay its just and legal debts; all of which was duly certified and reported to the Comptroller of the Currency of the United States, as provided by law.

3. That said Comptroller of the Currency, upon being duly satisfied according to law that said national bank was insolvent and unable to pay its just and legal debts, thereupon appointed the plaintiff receiver of the said "State National Bank of Wichita," with all the powers, duties, and responsibilities given to or imposed upon a receiver under the provisions of the Revised Statutes of the
13 United States, which authorize the appointment of a receiver, and the plaintiff accepted such appointment and duly qualified as such receiver and executed such bond with such surety as was required by law.

4. That upon a proper accounting by the plaintiff to the said Comptroller of the Currency and upon a valuation of the uncollected assets remaining in the hands of the said receiver the said

Comptroller of the Currency has ascertained and determined that in order to pay the debts of the said "State National Bank of Wichita" it is necessary to enforce the individual liability of the stockholders of the said association as provided by the acts of Congress, and especially as prescribed in section 5151 and section 5234 of the Revised Statutes of the United States.

5. That the Comptroller of the Currency, by virtue of the authority vested in him by law, has made an assessment and requisition upon the shareholders of the said "State National Bank of Wichita," which shareholders included the defendant in this action, for the sum of one hundred thousand dollars ($100,000), to be paid by them, ratably, on or before the 19th day of December, 1894, and upon each and every one of said stockholders, including the defendant in this action, the sum of one hundred dollars ($100) upon each and every share of the capital stock of said banking association held or owned by them respectively at the time of its failure.

6. That the said Comptroller of — has made said assessment payable in two installments, to wit, fifty dollars ($50) per share on or before December 19th, 1894, and fifty dollars ($50) per share on or before January 19th, 1895.

7. That said comptroller has directed the plaintiff to take all necessary proceedings, by suit or otherwise, to enforce to that
14 extent the individual liability of the said stockholders.

8. That the defendant at the time of said suspension and failure of said banking association was a shareholder of its capital stock to the amount of five shares, of the par value of one hundred dollars ($100) each and of the aggregate par value of five hundred dollars ($500), and held or was entitled to hold in his possession or control the usual stock certificates as such shareholder.

9. That the defendant by reason of the premises has become and now is indebted and liable to pay to the plaintiff, as such receiver, one hundred dollars ($100) upon or in respect to each and every of his said shares in said banking association as held or owned by him at the time of the failure and suspension of said banking association, and that such liability or indebtedness of the defendant amounts to the sum of five hundred dollars ($500).

10. That the defendant, although often requested to pay the last-mentioned sum to the plaintiff, as such receiver, has not paid the same or any part thereof, but has hitherto neglected and refused and still does neglect and refuse to pay the same.

The plaintiff claims judgment against the defendant for the sum of five hundred dollars ($500) damages, with interest thereon from the days when the installments of said sum were due and payable, as hereinbefore alleged, together with the costs of this action, to recover which this suit is brought.

CYRUS A. LELAND, *Receiver,*
By FREDERICK W. HOLDEN,
His Attorney.

And on the 29th day of August, 1895, answer to amendment to complaint was filed, in the words and figures following, viz:

wick and State of Kansas, has, after due examination of its affairs, reported to me that the said bank is insolvent, and being satisfied that the said bank is insolvent and unable to pay its just and legal debts:

Now, therefore, I, James H. Eckels, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of section 1 of an act of Congress entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved June 30th, 1876, do hereby appoint Cyrus A. Leland receiver of "the State National Bank of Wichita," with all the powers, duties, and responsibilities given to or imposed upon a receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver.

In witness whereof I have hereto subscribed my name
[L. S.] and caused my seal of office to be affixed to these presents. at the city of Washington, in the District of Columbia, this twenty-ninth day of June, A. D. 1894.

JAMES H. ECKELS,
Comptroller of the Currency.

The counsel for the plaintiff then offered in evidence a duly certified copy of an order of the Comptroller of the Currency, which was in the words and figures following:

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, *November* 19, 1894.

20 In the Matter of THE STATE NATIONAL BANK OF WICHITA, KANSAS.

To all whom it may concern:

Whereas, upon a proper accounting by the receiver heretofore appointed to collect the assets of "the State National Bank of Wichita," Kansas, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States:

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The State National Bank of Wichita" for one hundred thousand dollars, to be paid by them ratably on or before the nineteenth day of December, 1894; and I hereby make demand upon each and every one of them for one hundred dollars upon each and every share of the capital stock of said association held or owned by them respectively at the time of its failure; and I hereby direct Cyrus A. Leland, the receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this nineteenth day of November, A. D. 1894.

JAMES H. ECKELS,
[L. S.] *Comptroller of the Currency.*

21 The counsel for the defendant then and there objected to the said evidence, to wit, the copy of said order, as irrelevant, immaterial, and incompetent, on the ground that there is nothing in the complaint and nothing in the evidence to show that the individual liability of this stockholder is sought to be enforced for the purpose of paying any indebtedness due from the bank to the United States or for the purpose of enforcing any lien that the Government has upon the property of this stockholder, and that so far as appears here the determination of the comptroller relates merely to the claims of private persons for an indebtedness claimed to be due to them from the bank, and that the Comptroller of the Currency has no authority to make any such determination or decide any such question, and that Congress cannot confer any such authority upon him.

The said objection was overruled by the court, and the said certificate was admitted in evidence and marked Exhibit C.

To which ruling of the court the counsel for the defendant then and there excepted.

The counsel for the plaintiff then offered in evidence a copy of a notice served upon the defendant; which notice is in the words and figures following:

Office of the receiver of the State National Bank of Wichita, Kansas.

WICHITA, KANSAS, *Nov.* 19, 1894.

You will please take notice that the Comptroller of the Currency has levied an assessment upon the stockholders of the State National Bank of Wichita, Kansas, of one hundred dollars ($100) a share, payable at the office of the receiver on or before December 19, 1894.

22 The receiver is, however, authorized by the comptroller to grant an extension, without interest, to shareholders who pay 50 per cent. of the assessment on or before that date, and who will give a written obligation, satisfactorily guaranteed, to pay the remaining 50 per cent. on or before January 19, 1895.

You are therefore requested to pay the assessment on five shares of stock standing in your name, in accordance with the foregoing order and this notice, or suit will be commenced to enforce payment.

CYRUS A. LELAND,
Receiver State National Bank.

To John F. Bushnell, Esq., Saybrook, Conn.

The same was admitted in evidence and marked Exhibit D. It was admitted that the above notice was served upon the defendant before this action was brought.

The plaintiff here rested.

The evidence here closed, and the above was all the evidence taken on the trial.

Counsel for the defendant then moved the court to instruct the jury to return a verdict for the defendant, upon the ground that there is no evidence in the case to show that the action is brought for the purpose of enforcing any claim or lien of the United States; that, so far as appears from the evidence, the individual liability of the defendant as a stockholder of the State National Bank of Wichita is sought to be enforced merely for the purpose of paying the claims of private parties; that there is no evidence in this case to show that such parties are creditors of the State National Bank of Wichita, and that there is no evidence to show that the fact that these parties are creditors of the State National Bank of Wichita has ever been established by any decision or order of a court of competent
23 jurisdiction; that, so far as appears, the only decision on this point is that of the Comptroller of the Currency, and that his decision is of no force, for the reason that it is an attempt of an executive officer to exercise judicial functions.

And the said motion was overruled by the court.

To which ruling of the court the counsel for the defendant then and there excepted.

Counsel for the plaintiff then moved the court to instruct the jury to return a verdict for the plaintiff.

Which motion was granted by the court.

To which ruling of the court the counsel for the defendant then and there and before the jury returned their verdict excepted.

Thereupon the jury, under the instruction of the court, returned a verdict for the plaintiff in the sum of five hundred and twenty-seven and $\frac{91}{100}$ dollars.

And inasmuch as the said several matters so produced and given in evidence and the several rulings of the court thereon do not appear by the record herein, the counsel for the defendant did then and there prepare the foregoing bill of exceptions, which said bill of exceptions contains all the evidence taken at the trial, and did propose the same to the said William K. Townsend, United States district judge, and the said judge did thereupon sign the same, now for then, this 22d day of January, 1896.

WM. K. TOWNSEND, *Judge.*

It is hereby stipulated that the above bill of exceptions contains all the evidence taken upon the trial of this cause, and that the same may be signed and filed.

FREDERICK W. HOLDEN,
Attorney for Plaintiff.
JOHN J. CRAWFORD,
Attorney for Defendant.

24 District Court of the United States for the District of Connecticut.

CYRUS A. LELAND, Receiver, Plaintiff, *against* JOHN F. BUSHNELL, Defendant. } At Law. Petition for Writ of Error.

And now comes John F. Bushnell, defendant herein, and says that on or about the 3rd day of December, 1895, this court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf from the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

JOHN J. CRAWFORD,
Attorney for Defendant.

25 District Court of the United States for the District of Connecticut.

CYRUS A. LELAND, Receiver, Plaintiff, *against* JOHN F. BUSHNELL, Defendant.

And now comes the said John F. Bushnell, by John J. Crawford, his attorney, and says that in the record and proceedings in the above-entitled action there is manifest error, in this, to wit:

First. That the court directed a verdict for the plaintiff.

Second. That the court overruled the motion of the defendant to direct a verdict for the defendant.

Third. That the court admitted in evidence the order of the comptroller making an assessment and requisition upon the shareholders of the State National Bank of Wichita.

Fourth. That the court held that the provisions of the national bank act authorizing the Comptroller of the Currency to make the assessment upon the shareholders in this case are not in violation of the Constitution of the United States.

Fifth. That judgment was given for the *defendant*, whereas judgment should have been in favor of the defendant and against the plaintiff.

JOHN J. CRAWFORD,
Attorney for Defendant.

26 District Court of the United States for the District of Connecticut.

CYRUS A. LELAND, Receiver, Plaintiff,
against
JOHN F. BUSHNELL, Defendant. } At Law. No. —.

This 1st day of February, 1896, came the defendant, by his attorney, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendant giving bond according to law in the sum of seven hundred and fifty dollars, which shall operate as a supersedeas. WM. K. TOWNSEND, *Judge*.

27 Know all men by these presents that we, John F. Bushnell, as principal, and Robert S. Bushnell and Giles A. Bushnell, as sureties, are held and firmly bound unto the plaintiff, Cyrus A. Leland, as receiver of the State National Bank of Wichita, in the full and just sum of seven hundred and fifty dollars, to be paid to the said plaintiff, Cyrus A. Leland, as receiver of the State National Bank of Wichita, his successors and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a district court of the United States for the district of Connecticut, in a suit pending in said court between Cyrus A. Leland, as receiver of the State National Bank of Wichita, plaintiff, and John F. Bushnell, defendant, a judgment was rendered against the said John F. Bushnell, and the said John F. Bushnell having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Cyrus *D.* Leland, as receiver of the State National Bank of Wichita, citing and admonishing him to be and appear at a term of the Supreme Court of the United States, to be held in the city of Washington, on the — day of —— next:

Now, the condition of the above obligation is such that if the said John F. Bushnell shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

JOHN F. BUSHNELL. [L. S.]
ROBERT S. BUSHNELL. [L. S.]
GILES A. BUSHNELL. [L. S.]

FREDERICK H. BIRCH.
As to Rob't S. Bushnell.

28 STATE OF CONNECTICUT, } ss:
County of Middlesex, Old Saybrook, }

On this 11th day of February, in the year 1896, before me personally came John F. Bushnell and Giles A. Bushnell, to me known and known to me to be the persons described in and who executed the foregoing instrument, and severally acknowledged that they executed the same.

WILL. R. BUSHNELL,
[SEAL.] *Notary Public.*

STATE OF CONNECTICUT, } ss:
County of Middlesex, Old Saybrook, }

John F. Bushnell and Giles A. Bushnell, above named, named in and who executed the foregoing bond, being duly and severally sworn, says each for himself that he is a resident of the State of Connecticut and a freeholder in said State and is worth the sum of fifteen hundred dollars over and above all the debts and liabilities he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

JOHN F. BUSHNELL.
GILES A. BUSHNELL.

Sworn to before me this 11th day of February, 1896.

WILL. R. BUSHNELL,
[SEAL.] *Notary Public.*

STATE OF NEW YORK, } ss:
City and County of New York, }

On this 14th day of February, in the year 1896, before me personally came Robert S. Bushnell, to me known and known to me to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same.

FREDERICK H. BIRCH,
[SEAL.] *Notary Public* (264), *N. Y. Co.*

29 STATE OF NEW YORK, } ss:
City and County of New York, }

Robert S. Bushnell, above named, named in and who executed the foregoing bond, being duly sworn, says that he is worth the sum of fifteen hundred dollars over and above all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

ROBERT S. BUSHNELL.

Sworn to before me this 14th day of February, 1896.

FREDERICK H. BIRCH,
[SEAL.] *Notary Public* (264), *N. Y. Co.*

The within bond is approved.

WM. K. TOWNSEND,
U. S. District Judge.

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the district of Connecticut, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between Cyrus A. Leland, receiver of the State National Bank of Wichita, plaintiff, and John F. Bushnell, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

E. E. MARVIN,
Clerk of the District Court of the United States
for the District of Connecticut.

Allowed by—
WM. K. TOWNSEND, *Judge.*

31 UNITED STATES OF AMERICA, *ss:*

To Cyrus A. Leland, receiver of the State National Bank of Wichita, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States district court of the district of *Columbia*, wherein John F. Bushnell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William K. Townsend, judge of the district court of the United States for the district of Connecticut, this ninth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

WM. K. TOWNSEND,
Judge of the District Court of the United States
for the District of Connecticut.

32 [Endorsed:] United States district court, district of Connecticut. John F. Bushnell, plaintiff in error, against Cyrus A. Leland, receiver of the State Nat. Bank of Wichita, defendant in error. Citation. John J. Crawford, attorney for plaintiff in error, 54 William street, New York city. Service of a copy of the within citation admitted this 10th day of March, 1896. Frederick W. Holden, att'y for def't in error.

33 I, Edwin E. Marvin, clerk of the district court of the United States for the district of Connecticut, do certify that the foregoing is a true and correct copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case of Cyrus A. Leland, receiver, *vs.* John F. Bushnell.

In testimony whereof I have hereunto set my hand and the seal of said court, at Hartford, in said district, this 26th day of March, A. D. 1896.

[SEAL.] E. E. MARVIN, *Clerk.*

Endorsed on cover: Case No. 16,263. Connecticut D. C. U. S. Term No., 497. John F. Bushnell, plaintiff in error, *vs.* Cyrus A. Leland, receiver of the State National Bank of Wichita. Filed April 21, 1896.

164-684

164-684

No. 497.

Office Supreme Court, U. S.
FILED.
OCT 13 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

JOHN F. BUSHNELL,

Plaintiff in Error,

against

CYRUS A. LELAND, RECEIVER, ETC.

Defendant in Error.

MOTION TO ADVANCE.

FREDERICK W. HOLDEN and
EDWARD WINSLOW PAIGE,

Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1896.

JOHN F. BUSHNELL,
Plaintiff in Error,

against

CYRUS A. LELAND, Receiver of the State National Bank of Wichita, Kansas,
Defendant in Error.

No. 497.

ON MOTION TO ADVANCE.

Statement.

The defendant in error is the Receiver of the State National Bank of Wichita, Kansas.

On the nineteenth day of November, 1894, the Comptroller of the Currency, under his hand and the seal of his office, made an assessment upon the shareholders of that bank for one hundred thousand dollars, in pursuance of Sections 5151 and 5234 of the Revised Statutes.

The plaintiff in error is a shareholder, and his ratable proportion of the assessment not being paid, the Receiver, by the direction of the Comptroller, has brought this action to recover it.

The plaintiff in error has defended the action upon the grounds "that it was not shown that the action was

" brought for the purpose of enforcing any claim or lien " of the United States, and that so far as appears from the " evidence the individual liability is being enforced " merely for the purpose of paying the claims of private " parties; that there is no evidence to show that such " parties are creditors of the bank, nor that their claims " have been established as such by the judgment or order " of any court of competent jurisdiction; that so far as " appears, the only decision on that point is that of the " Comptroller of the Currency, and that his decision is of " no force for the *reason that it is an attempt of an ex-* " *ecutive officer to exercise judicial functions.*"

The above appears by the affidavit of the Comptroller of the Currency, and they are the only matters of defense.

It further appears by the Comptroller's affidavit, that there are at least one hundred and ten banks, the concerns of which are in the hands of receivers, and the personal liabilities of the stockholders of which are being enforced in similar manner.

Reasons.

The administration of the assets of the one hundred and ten banks is delayed, and " the United States are concerned " both by the hampering of the administration of the department of the Comptroller of the Currency, and as a creditor.

Notice of this motion has been served upon the counsel for the plaintiff in error and proof of service filed with the clerk.

IN THE U. S. SUPREME COURT.

JOHN F. BUSHNELL,
Plaintiff in Error,

against

CYRUS A. LELAND, as Receiver, etc.,
Defendant in Error.

No. 497 of October Term, 1896.

Comes now the defendant in error, by direction of the Comptroller of the Currency, and submits to the Court, by reference to the affidavit of the Comptroller of the Currency filed in support thereof and to the record, that this is a case where the United States are concerned, inasmuch as the collection of the assets of one hundred and ten national banks is delayed thereby, and the proceeds of the assets of all the national banks which fail are paid into the Treasury and are distributed among the various claimants by the Comptroller of the Currency, and inasmuch as the United States are responsible for all the currency of national banks. And the defendant in error, therefore, respectfully moves the Court to advance the cause upon the docket and set it down for hearing at an early day.

SUPREME COURT OF THE UNITED STATES.

JOHN F. BUSHNELL,
Plaintiff in Error,

against

CYRUS A. LELAND, Receiver of the State National Bank of Wichita, Kansas,
Defendant in Error.

DISTRICT OF COLUMBIA, ss.:

JAMES H. ECKELS, being duly sworn, says that he is the Comptroller of the Currency

That this action was brought by the Receiver of the State National Bank of Wichita, by affiant's direction, against John F. Bushnell, a stockholder in said bank, to enforce his individual liability as a stockholder pursuant to sections 5151 and 5234 of the Revised Statutes. That the said Bushnell has defended the action upon the grounds that it was not shown that the action was brought for the purpose of enforcing any claim or lien of the United States, and that so far as appears from the evidence, the individual liability is being enforced merely for the purpose of paying the claims of private parties; that there is no evidence to show that such parties are creditors of the bank, nor that their claims have been established as such by the judgment or order of any Court of competent jurisdiction; that so far as appears, the only decision on that point is that of the Comptroller of the Currency, and that his decision is of no force for the reason that it is an attempi of an executive officer to exercise judicial functions.

That the said Bushnell is still defending the action in this Court on the said grounds.

Affiant further says that there are at least one hundred and ten banks the concerns of which are in the hands of receivers, and the individual liabilities of the stockholders of which are being enforced under the determination of the Comptroller of the Currency, and affiant is advised that the same question can be raised in the case of each bank, and in the case of each suit against each stockholder of each of said banks, and thus the administration of the whole of them be delayed until the determination of this case.

JAMES H. ECKELS.

Sworn to before me this eighth day of September, 1896.

JAMES N. FITZPATRICK,
[L. S.] Notary Public.

SIRS:

The Supreme Court will be moved as aforesaid at the opening of the next term on the second Monday of October, 1896, or as soon thereafter as counsel can be heard.

Yours, etc.,

FREDERICK W. HOLDEN,
Counsel for Defendant in Error.

To JOHN J. CRAWFORD, Esquire,
54 William Street, New York,
Counsel for Plaintiff in Error.

164-684

164-684.

Supreme Court, U. S.
FILED,
DEC 1 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 497.

JOHN F. BUSHNELL,

Plaintiff in Error,

against

CYRUS A. LELAND, RECEIVER OF THE STATE NATIONAL BANK OF WICHITA, KANSAS,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN J. CRAWFORD,

Counsel for Plaintiff in Error.

UNITED STATES SUPREME COURT.

JOHN F. BUSHNELL,
Plaintiff in Error,

against

CYRUS A. LELAND, Receiver of the State National Bank of Wichita, Kansas,
Defendant in Error.

No. 497.

Statement.

This is a writ of error to the United States District Court for the District of Connecticut.

The action was brought by the defendant in error as Receiver of the State National Bank of Wichita, Kansas, against the plaintiff in error as a stockholder of such bank.

To establish the liability of the defendant as such stockholder, the plaintiff offered in evidence an order of the Comptroller of Currency, as follows:

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY.

WASHINGTON, November 19, 1894.

IN THE MATTER
of
THE STATE NATIONAL BANK OF
WICHITA, KANSAS.

TO ALL WHOM IT MAY CONCERN.

WHEREAS, upon a proper accounting by the Receiver heretofore appointed to collect the assets of "The State National Bank of Wichita," Kansas, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders thererefor to the extent hereinafter mentioned, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States;

NOW, THEREFORE, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the stockholders of the said "The State National Bank of Wichita" for one hundred thousand dollars, to be paid by them ratably on or before the nineteenth day of December, 1894; and I hereby make demand upon each and every one of them for one hundred dollars upon each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Cyrus A. Leland, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

IN WITNESS WHEREOF, I have hereunto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this nineteenth day of November, A.D. 1894.

[L. S.] JAMES H. ECKELS,
Comptroller of the Currency.
(Folio 20).

To the admission of this order in evidence the defendant objected, upon the ground that there was nothing in the complaint or in the evidence to show that the individual liability of the defendant as a stockholder was sought to be enforced for the purpose of paying any indebtedness due from the bank to the United States, or for the purpose of enforcing any lien that the Government had upon the property of the defendant, and that, so far as appears, the determination of the Comptroller related merely to the claims of private persons for an indebtedness claimed to be due to them from the bank, and that the Comptroller of the Currency had no authority to make any such determination, or to decide any such question, and that Congress could not confer any such authority upon him (folios 20–21).

The Court overruled the objection and the order was admitted in evidence, and to this ruling the counsel for the defendant excepted. No other evidence was offered by the plaintiff to show that there was any necessity for enforcing the individual liability of the stockholders.

The defendant offered no evidence; and at the close of the case moved the Court to direct a verdict for the defendant, upon the ground that there was no evidence in the case to show that the action was brought for the purpose of enforcing any claim or lien of the United States; that so far as appeared from the evidence the individual

liability of the defendant as a stockholder of the State National Bank of Wichita was sought to be enforced merely for the purpose of paying the claims of private persons, and that there was no evidence to show that such parties were creditors of the State National Bank of Wichita, and that there was no evidence to show that the fact that these parties were creditors of such bank had ever been established by any order or decision of a Court of competent jurisdiction; that so far as appeared, the only decision on this point was that of the Comptroller of the Currency, and that his decision was of no force, for the reason that it was an attempt of an executive officer to exercise judicial functions (folio 22).

The motion was denied by the Court, and defendant excepted. The Court then granted the plaintiff's motion to direct a verdict in his favor, and to this ruling the defendant also excepted (folio 23).

Assignment of Errors.

The plaintiff in error makes the following assignment of errors:

FIRST.

That by the record and bill of exceptions herein it appears the Court admitted in evidence an order of the Comptroller of the Currency laying an assessment upon the stockholders of the State National Bank of Wichita to pay the debts of said bank, and which order was incompetent for the purpose of establishing any liability on the part of the stockholders of said bank.

SECOND.

That the Court overruled the motion of the defendant to direct a verdict for the defendant.

THIRD.

That the Court directed a verdict for the plaintiff.

FOURTH.

That the Court held that the provisions of the National Bank Act, authorizing the Comptroller of the Currency to make the assessment upon the shareholders in this case are not in violation of the Constitution of the United States.

FIFTH.

That the District Court did not have jurisdiction of this action, for the reason that Section 1 of the Act of June 30, 1876, entitled "An Act authorizing the Appointment of Receivers of National Banks," etc., is unconstitutional; and hence the plaintiff was not an officer of the United States entitled to sue in the District Court.

POINTS.

I.

The provisions of the statute authorizing the Comptroller of the Currency to make the order of assessment admitted in evidence are unconstitutional, for the reason that the powers so attempted to be conferred upon that officer are judicial powers.

It is not disputed that the statute authorizes the Comptroller to make the order objected to, and the only question on this part of the case is, whether the statute,

so far as it confers such authority, is in violation of the Constitution, as being an attempt to vest judicial powers in the Executive branch of the Government.

The provisions of the statute are as follows:

"The shareholders of every national banking association shall be held individually responsible, equably and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." (Rev. Stat. U. S., Sec. 5151.)

"On becoming satisfied * * * that the association has refused to pay its circulating notes * * * and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association on such terms as the Court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such Receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings." (Rev. Stat. U. S., Sec. 5234.)

"Whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the Clerk of the Court stating that such judgment has been rendered, and has remained unpaid for

the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of the national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty four of such statutes."

(Act of June 30, 1876, Sec. 1.)

"The Comptroller shall, upon appointing a receiver, cause notice to be given, by an advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof." (Rev. Stat. U. S., Sec. 5235.)

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such Receiver, on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated, and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held." (Rev. Stat. U. S., Sec. 5236.)

These provisions have at various times been construed by this Court, and the Court has held that under them it is the duty of the Comptroller of the Currency to decide when proceedings are necessary against the stockholders to enforce their individual liability, and to what extent such liability shall be enforced. (*Kennedy* v. *Gibson*, 8 Wall., 498); and, also, that the decision of the Comptroller

on these questions is conclusive upon the stockholders. (*Casey* v. *Galli*, 94 U. S., 673.)

It was not suggested in any of these cases that such powers could not be vested in the Comptroller, and, upon well-settled principles, the Court would not pass upon that question until it was directly raised.

Let us first consider the character of the parties in interest in this action. The order of the Comptroller laying the assessment states that it appears to the satisfaction of the Comptroller that in order to pay the debts of the bank it is necessary to enforce the individual liability of the stockholders therefor. This statement, it will be observed, is not limited to any particular kind of indebtedness, or to any particular creditor. The assessment is made for the purpose of paying debts generally. It is possible that some part of the indebtedness is owing to the United States; but as the statute does not authorize an assessment for the special purpose of paying debts due from the bank to the United States, but authorizes the assessment only for the purpose of paying all the debts alike, it cannot be presumed that the entire indebtedness referred to is due to the United States. As by far the largest part of the dealings of the bank are with private persons, the debts are presumably, for the most part, if not entirely, debts due to such persons. The parties in interest, then, are mostly, if not exclusively, private citizens. On the one side there are private citizens who claim to be creditors of the bank, and on the other side is a private citizen who is a stockholder in the bank, and who is sought to be held liable for the debts of the bank to these alleged creditors. The case is, therefore, one affecting private rights; and is an effort to collect money from one man to pay a debt claimed to be due to another man.

Now, for what is this plaintiff in error liable as a stockholder in the State National Bank of Wichita? Why, for

the debts due from the bank. And to whom is he liable? Why, to the creditors of the bank. But he is not liable to every person who may assert that he is a creditor of the bank. He is liable only to such persons as are in law and in fact creditors. Before he can be held liable to persons claiming to be such, it must be established in some competent way that the bank is indebted to them. And how can the Comptroller know whether it is necessary to enforce the liability of the stockholders until the amount of the claim has been ascertained? And how can he know what the claims amount to before it has been settled what claims are valid claims against the bank? His order involves of necessity some prior decision by which the validity of the claims and the amount thereof has been determined. Now, there is no evidence in the case to show that these questions have ever been passed upon by any competent judicial tribunal. Nor is there any provision in the law requiring them to be so determined, from which we might infer that this had been done. So far as appears, these important preliminary questions have been decided by the Comptroller himself. And it is to be said, that the statute expressly authorizes him to do so; and this Court in *National Bank of Commonwealth* vs. *Mechanic's National Bank* (94 U. S., 473) held that under the statute claims "proved to the satisfaction of the Comptroller are of the same efficacy as judgments, and occupy the same legal ground." Now, the effect of this is, that the Comptroller's allowance of a claim fixes conclusively the liability of the stockholder to pay the same. In other words, the Comptroller of the Currency, an executive officer of the Government, is authorized to decide that A owes a debt to B which C is required to pay.

Now, let us examine briefly into the nature of the powers which the Comptroller exercises in passing upon the claims made against the bank. These claims arise in

a variety of ways, and involve the decision of many questions both of law and of fact. For example, a claim is made upon a re-discount; and the bank is sought to be held liable upon the indorsement of the paper so re-discounted. In such a case the fact would have to be settled whether the indorsement was made by an officer of the bank, whether the bank actually received the money upon such re-discount; whether the officer indorsing the paper had authority to act for the bank; and the question would have to be decided whether as a matter of law the bank could be held liable on the paper. So, where a claim is based upon an alleged acceptance of the bank, the Comptroller may have to decide whether such acceptance is within a State statute requiring acceptances to be in writing, or requiring them to have other formal requisites. So, he may have to decide whether a claim is barred by the Statute of Limitations; whether the contract upon which the claim is based is one which the bank had authority to make; or whether the officer by whom it was executed was authorized to execute it on behalf of the bank; whether the contract in the manner of its execution or otherwise conforms to the requirements of the statute or the common law; and an infinite variety of other matters both of law and of fact. And further, he must decide whether the claims so made are of such a character that the liability of the stockholders can be enforced to pay them.

It is true, the Comptroller may have these questions decided by the courts; but he is not required to do so; the statute, on the contrary, expressly authorizes him to pass upon them himself; and to distribute not only the assets of the corporation, but the money collected from the stockholders, among the persons whose "claims may have been proved to his satisfaction." It is highly probable, therefore, that some, if not all, of the debts which

this stockholder is asked to pay, are merely such claims as the Comptroller has allowed. At least, there is no evidence to show that the indebtedness has been established in any other way; and it can hardly be presumed that the Comptroller has entirely abstained from exercising the power expressly conferred upon him. Besides, it is a condition precedent to the liability of the stockholder that there should be a valid and subsisting indebtedness due from the bank, and the burden of showing that this indebtedness has been established in some competent way should be upon the creditors, or the person representing them.

It may be, perhaps, that where a claim involves complicated facts, or difficult questions of law, the Comptroller requires it to be submitted to the courts. But I apprehend that it makes not the slightest difference whether the case is a difficult one or is the simple case of a balance due to a depositor. The allowance of any claim involves a decision upon questions of law and fact, and in determining the nature of the power exercised, it is not a material circumstance that the questions presented are easy of solution.

Moreover, we have no means of knowing what claims the Comptroller has submitted to the courts, and what claims he has passed upon himself; and claims which seem simple to the Comptroller might appear otherwise if subjected to the scrutiny of a court.

There is nothing novel in the requirement that the stockholders shall be liable to a limited extent for the debts of the corporation. This is a provision found in various forms in many statutes. Usually such liability is enforced by an action brought by the creditors themselves against the stockholders. Suppose, now, this were the method of proceeding under the National Bank Act; and suppose the plaintiff here were a creditor of the bank. To

maintain his action he would have to show in some proper way that the bank was indebted to him. Most statutes require that this shall be done by proving that a judgment has been obtained against the corporation (see, for instance, Hirschfied *vs.* Ropp, 145 N. Y., 84). Now, suppose that in such an action the plaintiff, to prove the fact of the bank's indebtedness to him, should offer in evidence the determination of the Comptroller to that effect. Plainly the evidence would be incompetent, for the reason that the power to make such determination is a judicial power, and cannot be vested in an executive officer. But the only difference between this supposititious case and the case at bar is a difference of form. In the one the decision of the Comptroller establishing the debt is offered in evidence; in the other this decision is not itself a part of the plaintiff's evidence, but it is the basis of the assessment upon which he seeks to recover. In both the liability of the stockholder rests upon an alleged indebtedness due from the bank; and in both the mode of establishing the fact of that indebtedness is the decision of an executive officer.

The decision of this Court in the case of *Kilbourn* v. *Thompson* (103 U. S., 168), bears directly upon the questions involved here. In that case the point to be decided was whether Congress had power to punish the plaintiff for his refusal to answer a question propounded by a committee of the House. The resolution under which the committee was acting directed the committee to investigate certain business transactions in which the United States Government was interested simply as a creditor, and this Court placed its decision expressly upon the ground that as the object of the investigation was the collection of a debt due the Government, the matter was one within the exclusive cognizance of the courts, and Congress was without jurisdiction. Well now, if the legislative branch

of the Government cannot take jurisdiction of a matter where the United States makes a claim as a creditor, how can an officer of the executive branch get jurisdiction of a claim alleged to be due from one individual to another? The decision in *Kilbourn* v. *Thompson* holds that Congress cannot even investigate business transactions in which the Government may be interested as a creditor where the object is merely to enforce its claim. But the power attempted to be vested in the Comptroller far exceeds that; for he not only investigates into claims arising between private citizens; but he is authorized to decide whether it is necessary to take recourse against those who are in the position of debtors; and, further still, he is authorized to finally determine questions of law and fact which fix the liability of the debtors and the extent thereof.

The nature of the functions performed by the Comptroller will appear more clearly if we contrast them with the duties performed by a Receiver appointed by the Court. Such a Receiver takes proof of claims, and he is commonly said to allow a claim or dispute it. But his allowance is not final. It does not bind either the corporation or the stockholder. It does not become binding upon any one (except possibly upon the Receiver himself) until he has brought his report into court, and his allowance of the claim has been confirmed by the Court, or the Court has otherwise passed upon it. In that case, the action of the Receiver is only provisional; it is the order or judgment of the Court which establishes the validity of the claim, and the liability of the parties. But under this statute, the Comptroller's allowance of a claim is final. He is not required to submit any report to a court; and even if the corporation or the stockholders desired to dispute the claims, there is no way they could bring the matter before a court. And the Comptroller's decision is not only binding upon the corporation, but binds the stockholder as

well, and establishes conclusively his liability to pay the claims out of his individual means. This is certainly an extraordinary power to be given to any one. To give it to a judge, without providing for some way of correcting his errors, would be deemed unheard of. What shall we say of it when it is bestowed upon an executive officer?

As the Court will recall, the National Bank Act was modeled upon the New York Banking Law, and in most of its provisions follows the New York statute closely. Now, suppose that Congress instead of adopting the anomalous procedure of having an insolvent corporation wound up under the direction of an executive officer, had preserved the winding up features of the New York statute. That statute commits the supervision of the banks, while they are going concerns, to an executive officer; but when a bank becomes insolvent, then it is the duty of this executive officer to report the fact to the Attorney-General, who makes a motion to the proper Court for the appointment of a Receiver; and if the Court is satisfied of the bank's insolvency, it appoints a Receiver, and the winding up is conducted under the direction of the Court. This system preserves the proper distinction between the executive and judicial branches of the Government. While the bank is a going concern, it is appropriate that it should be under the supervision of an officer belonging to the executive branch; for with respect to a bank in that situation, his duties will consist entirely of enforcing and executing the laws. But when the bank has become insolvent, and its affairs are to be liquidated; when its assets are to be sequestrated and distributed among the persons entitled thereto; when there are numerous rights and equities to be settled; when there are various and conflicting claims and interests to be adjusted among the creditors, and between the creditors and the stockholders, then it is appropriate that the entire

matter should be left to the Courts. Now, suppose this system had been applied to the National Banks, and suppose the duty of winding up the insolvent National Banks had been vested in the United States Circuit or District Courts. Could there be any doubt that the power was properly reposed there? Not the least; for it is a jurisdiction that Courts have exercised for many years and are exercising daily. Well now, if it could with so much propriety be vested in the Courts, how can it, with equal propriety, be vested in an executive officer? There are doubtless some matters, the settlement of which Congress may commit to the executive or judicial branch as it prefers. For example, the authority to settle claims against the United States may be given to an executive officer; for in waiving its right to immunity and admitting its liability, the Government may prescribe the terms upon which it will pay. So, when in the exercise of its sovereignty it excludes aliens, it may, as this Court has suggested, leave all questions arising under the law to be determined by an executive officer, or it may, if it thinks proper, call upon the Courts for this purpose. In this class of cases, the questions are not judicial, unless Congress sees fit to make them such. But cases of this character rest upon considerations which are not applicable here. In *Kilbourn* vs. *Thompson* (103 U. S., 168), this Court held that when the United States seeks to enforce claims as a creditor, it should proceed through the Courts, so that even if the debts for which the liability of this stockholder is sought to be enforced, or some part of them, are due to the United States (which, however, does not appear), the proceeding is a judicial one. But the United States is not the sole creditor interested (even if it has any interest at all), for the assessment is made to pay debts generally. Some of the creditors, if not all of them, are private citizens, and

questions of private rights are involved; and the principle is well established that "the power to hear and determine rights of property and person between private citizens is judicial, and can be conferred only on the Courts." (*State* vs. *Hawkins*, 44 Ohio St., 98; *Merrill* vs. *Sherburne*, 1 N. H., 199; *Kilbourn* vs. *Thompson*, 103 U. S., 168.) I do not mean to contend that no part of the business of winding up the bank may be committed to the executive branch of the Government. It might be more suitable, and much more in accordance with established precedents, to leave the whole matter to the Courts; but we do not undertake to say that duties which are merely administrative may not be performed by an executive officer. Usually, these administrative duties are discharged by an officer of the Court; and they may be discharged by such an officer with at least equal propriety. And why? Because they are merely incidental to duties which are strictly judicial. The Court has jurisdiction because there are rights and equities to be settled and adjusted; and the administrative duties are merely in performance of some order or decree of the Court.

I am not unmindful of what was perhaps the primary purpose of the original law in authorizing the Comptroller to appoint a receiver. The Act made the United States ultimately liable for the redemption of the notes to be issued by the national banks, and gave the United States a paramount lien upon the assets of the bank to reimburse it for any amount expended in paying such notes. (Sec. 5230, Rev. Stat. U. S.) It was quite within the authority of Congress, then, to reserve to the United States the right to proceed through an executive officer to sequestrate the assets and enforce its lien; and if the action of the Comptroller involved no more than this, I should say that it was entirely proper, and was sustainable upon the ground that Congress might provide that the lien should

be enforced in a summary way, without any judicial proceeding at all. But Congress could not go further and commit to this executive officer the power to decide questions of law and fact arising between the bank and its creditors and between the creditors and the stockholders of the bank. That is a very different matter, and rests upon very different legal principles. Moreover, whatever may have been the original object, the purpose of the Act of 1876 is to give the Comptroller jurisdiction, though there is no lien or claim of the United States to enforce; for that act provides that the Comptroller may appoint a receiver and enforce the liability of the stockholders whenever a private creditor has obtained judgment against the bank which has remained unpaid for thirty days, or the Comptroller has become satisfied of the insolvency of the bank. And it will be noticed that the Comptroller was proceeding under this later statute in appointing the Receiver in this case; for in his order he says: "Whereas, W. N. Ewing, a National Bank Examiner, duly authorized and directed by me to examine the affairs of 'The State National Bank of Wichita,' located in the City of Wichita, County of Sedgwick and State of Kansas, has, after due examination of its affairs, reported to me that the said bank is insolvent, and being satisfied that the said bank is insolvent and unable to pay its just and legal debts: Now, therefore, I, James H. Eckels, Comptroller of the Currency, in pursuance of the power and authority vested in me by law, and under the provisions of Section 1 of an Act of Congress, entitled 'An Act authorizing the appointment of Receivers of National Banks, and for other purposes,' approved June 30th, 1896, do hereby appoint, etc." (folios 19–20); and he makes no suggestion that the notes of the bank have been dishonored. There is no reason to suppose then, that in this case there was any necessity for enforcing the lien of the United States. Besides, even if he were

proceeding to enforce the lien of the United States, this would give him no right to decide as to the liability of the stockholders; for the United States has no prior claim upon them, nor any lien upon their property; but their liability is for all the debts of the bank ratably.

Now, it may be said, perhaps, that the stockholders by becoming such, consent that these questions shall be decided by the Comptroller. There are doubtless cases where a stockholder must be deemed to assent to all the conditions contained in the act under which the corporation is organized. But that principle cannot apply here; for the point in this case is the incapacity of an executive officer to receive the jurisdiction. The Constitution prohibits him from exercising any powers which belong properly to the judicial branch of the Government, and the consent of parties cannot confer upon him what the Constitution forbids him to receive. If parties cannot by consent confer jurisdiction upon a federal court (and no principle is better settled than that they cannot), how can it be said that an executive officer may acquire judicial power by consent? If Congress may say to the stockholders of a national bank, If you accept the benefits of this act, you must also accept all its burdens and conditions, and among them this condition, that in case of the insolvency of the bank, the validity of the claims made against it shall be decided by the Comptroller of the Currency, whose decision shall be binding upon you in respect to your individual liability for such claims, why may Congress not go further and say that the Comptroller shall have jurisdiction to decide all cases arising under the National Bank Act? Why should his jurisdiction be limited to claims against an insolvent bank? Why might he not receive jurisdiction to decide claims made against the bank while it is a going concern? If consent of parties can confer jurisdiction in the one case, it can in

the other as well. And what would be the logical conclusion of such a principle? It would result in this, that Congress could annex to every statute conferring any rights or privileges a condition that any person claiming or asserting such right or privilege should submit his case to the decision of an executive officer, or of Congress.

If any authority were needed on a matter so plain as this, a decision in point is that of the Supreme Court of Wisconsin in *Van Slyke* vs. *Trempealeau, etc., Insurance Company* (39 Wis., 390). In that case it was held that a statute authorizing parties by consent to try their cases before a counsellor of the Court was invalid, as being a violation of the constitutional provision vesting the judicial power in the courts, and the judgment entered after a trial had under this statute was declared void, though the parties had stipulated in writing that a counsellor of the Court might act as judge.

I do not mean to say that Congress may not, under any circumstances, authorize the Comptroller to levy an assessment upon the stockholders for the purpose of paying the debts of the bank. Such a proceeding on his part might not be illegal if he acted only in an administrative capacity. For example, if the act provided that the Receiver should present his report to the United States Circuit Court, and the Court, upon the motion to confirm the report, or otherwise, had settled and adjusted the claims against the bank, then, perhaps, the merely administrative duty of making the assessment might be performed by the Comptroller; and this might likewise be the case if the assessment were merely a provisional estimate, made for the purpose of collecting a fund to pay such indebtedness of the bank as might be established by the order or judgment of some competent Court. But the difficulty is that the powers conferred upon the Comptroller are not merely administrative. He settles and allows the

claims, and his decision has the force of a judgment, and he is expressly authorized to apply the money he collects from the stockholders to the payment of claims which he himself has adjudicated. He is thus vested with all the powers of a court, and without any of the restraints that are placed upon a court; for while his decision binds conclusively the corporation and the stockholder, neither of them has any right or opportunity to dispute the claim or to be heard in respect thereto, nor is there any mode by which the errors of the Comptroller can be corrected. And in this respect the case affords a good illustration of some of the evils that must result from bestowing judicial power elsewhere than in that branch of the Government in which the Constitution declares that it shall be reposed.

II.

The plaintiff was not an officer of the United States authorized to sue in the District Court, for the reason that Sec. 1 of the Act of June 30, 1876, under which he holds his appointment, is unconstitutional.

There is a question in this case which was not raised in the Court below, but which this Court may, nevertheless, consider, namely, whether the District Court had jurisdiction of the action. There is no certificate in the record; but as the case comes here upon the constitutional question, the Court has the power to pass upon all other questions involved, and among them that of jurisdiction. (*Chappell* vs. *United States*, 160 U. S., 499, 509; *Horner* vs. *United States*, 143 U. S., 570, 576–577; *United States* vs. *Jahn*, 155 U. S., 109, 112–113).

The ground upon which the jurisdiction is questioned is this, that Section 1 of the Act of June 30, 1876, by which the Comptroller of the Currency is authorized to appoint a receiver at the instance of a private creditor of the bank, and for the protection of the general creditors, is unconstitutional, for the reason that such powers are judicial powers, and can be vested only in the courts; and hence the receiver is not an officer of the United States within Sec. 563 Rev. Stat. U. S. Sub. 4, and entitled to sue in the District Court.

I am not forgetful of the rule which forbids the appointment of a receiver to be questioned collaterally. But I apprehend that this rule is limited to cases where there is a power to appoint, and the objection is to the propriety or the regularity of the appointment. If there is no power to appoint, or if the Statute conferring such power is for any reason void, then the objection goes to the jurisdiction, and can be raised in any action or proceeding where the title of the Receiver, or his right to sue, is involved.

The Court will notice that the Comptroller's order appointing the receiver is based entirely upon the authority conferred by Section 1 of the Act of June 30, 1876. The recital is that a bank examiner has reported to the Comptroller that the bank was insolvent, and that being satisfied that the bank is insolvent, and unable to pay its just and legal debts he, the Comptroller, in pursuance of the power and authority vested in him by law, and under the provisions of Section 1 of the Act of Congress entitled "An Act Authorizing the Appointment of Receivers of National Banks, and for other purposes," approved June 30, 1876, appoints, etc. (folios 19–20). It is not stated or intimated that the bank had failed to pay any of its circulating notes, or that the fact of the dishonor of such notes had been ascertained as required by Sections 5226 and 5227 of the Revised Statutes. The power to make the appoint-

ment must then be found in the Act of 1876. It is obvious that this act was intended to give the Comptroller much larger powers than those conferred by the original Act. Under the provisions of Section 5234 of the Revised Statutes he could not appoint a receiver until the bank had refused to pay its notes, and after this fact had been ascertained by a formal protest. The primary purpose of conferring the power in that case was doubtless for the purpose of protecting the United States, which was ultimately liable for the notes. But the primary purpose of the later act was the protection of the general creditors of the bank. This is shown plainly by the language of the act, which is "Whenever any creditor of any national banking association shall have obtained a judgment against it, in any court of record, and made application, accompanied by a certificate from the Clerk of the Court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of the national banking association, he may, after due examination of its affairs, in either case, appoint a Receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes." Besides, no further power than that conferred in the original law was necessary to the protection of the United States. The history of the national bank also shows that the act of 1876 was designed solely for the benefit of private creditors. The banks were authorized to issue circulating notes to ninety per cent. only of the par value of the bonds deposited as security therefor; and as the bonds of the United States have always been of sufficient value to pay the notes so issued against them the insolvency of the bank could not affect the United States; and so far as the United States was concerned the question whether the

assets should be sequestrated and a Receiver appointed for the corporation has never been of practical importance. Hence, the protesting of a note of an insolvent bank was a mere formality for the purpose of laying a foundation for the appointment of a Receiver; and the only necessity for such appointment was the protection of the general creditors. It was probably very inconvenient, and in many cases perhaps impossible, to comply with this formality, and therefore Congress by the later act dispensed with it. Now, I do not deny that Congress may authorize the Comptrollor to sequestrate the assets of the bank for the purpose of enforcing the lien of the United States, for this is nothing more than reserving to the United States a summary method of satisfying its own claims. But the sequestration of the property of a corporation, and the appointment of a Receiver, for the protection of the general creditors, is a judicial power which belongs exclusively to the Courts.

The power to take possession of property, and to hold it pending the settlement of the rights of parties with respect thereto, is a well defined branch of the general equity jurisdiction. It was exercised by the Court of Chancery in England long prior to the adoption of the constitution; and when the constitution declared that the judicial power should extend to all cases in law and in equity in certain enumerated instances, this part of the power of the Court of Chancery, together with other powers of that Court, was vested in the judicial branch of the government. The power is one which the Courts, both State and National, constantly exercise. The appointment of Receivers for corporations is a very important branch of the jurisdiction of the United States Circuit Court; and those Courts exercise this power not under some statute expressly authorizing them to appoint receivers, but in virtue of their general equity jurisdiction.

Indeed, they have, in the exercise of their general equity powers, appointed receivers for national banks, and their authority to do so has been sustained. (*Irons* vs. *Manufacturers' Nat. Bank*, 6 Biss., 301; *Wright* vs. *Merchants' Nat. Bank*, 1 Flippin, 561). We have thus, in this important matter, a concurrent jurisdiction existing in the executive and judicial branches of the Government. But this is inconsistent with the fundamental principle of a complete separation of the different departments of the Government. If the power is one which properly belongs to the judiciary, it cannot be conferred upon either of the other departments.

If Congress may confer authority upon the Comptroller of the Currency to appoint a receiver for an insolvent national bank, it may with equal propriety confer upon some other executive officer authority to appoint a receiver for the Pacific railroads whenever they default on their bonds, as they so frequently do. Now those railroads, for most of their existence, have been in the hands of receivers appointed by the courts, and if Congress should authorize the Secretary of the Interior, for example, to appoint a receiver for them we should have at once a direct conflict of jurisdiction between the executive and judicial departments, which is one of the very things the framers of the Constitution aimed to prevent.

Now, so far as the United States is concerned, it has a much more direct interest in the Pacific railroads than it has in the national banks. It has issued its own bonds to aid those roads, and there is a very large indebtedness owing to it from them, which it has made many fruitless efforts to collect, and it has some sort of a lien on the property of those corporations which is a more or less precarious security. On the other hand, the notes of the national banks are secured by a deposit of the bonds of the United

States, and if it only pays its own bonds, the notes can be redeemed out of the proceeds, and there will never be any occasion to make good its guaranty of those notes. I say then that there would be stronger reasons for supporting the power of an executive officer to appoint a receiver for those railroads than to authorize him to appoint a receiver for a national bank.

Indeed, if the exercise of this jurisdiction by an executive officer were to be sustained, it might be easy to find grounds upon which it could be exercised in a great variety of instances; and it is impossible to see where the power would stop. The only safe rule then is in a strict and rigid adherence to the principle that Congress cannot confer upon any other department of the Government the power which naturally and properly belongs to the courts.

The Court will observe that the Act of 1876 increases the powers of the Comptroller in this respect also, that his decision as to the facts upon which the appointment of the Receiver is based is made final and conclusive. Under the original statute the bank might dispute the finding of the Comptroller that it had refused to pay its notes, and might have the fact passed upon by a competent Court (Rev. Stat. U. S., 5237). But by the later act his finding that a judgment has been rendered against the bank and has remained unpaid for thirty days, or that the bank is insolvent, is conclusive. (*Washington National Bank* vs. *Eckels*, 57 Fed. Rep., 870.) It would strike the legal mind as monstrous to give any such power to a single Judge; and how much worse is it to confer it upon an executive officer, who is bound by no fixed rules of procedure and before whom the various parties in interest have no right to be heard.

There is another aspect in which this matter may be considered. The appointment of the Receiver is based upon

the finding of the Comptroller that the bank is insolvent. Now, this finding involves an inquiry as to the amount and value of the assets, and the extent and validity of the claims. It may be determined in some cases, perhaps, by a bare inspection of the books; but in most cases it will depend upon an inquiry as to the value of the assets, or as to the validity of some of the claims. For example, cases have sometimes arisen where an officer has borrowed money ostensibly for the bank, but has converted it to his own use. Now, it may be that whether the bank is insolvent or not will depend upon the question whether the bank is liable on the money so borrowed. But this is only one of an infinite variety of questions that may be involved in the ascertainment of the fact of the bank's insolvency. A finding or decision on this point is, therefore, a judicial function which an executive officer is incapable of performing; and as he cannot make such decision, his act based upon that decision must be void.

It is submitted, therefore, that Section 1 of the Act of June 30, 1876, entitled "An Act Authorizing the Appointment of Receivers of National Banks, etc.," is unconstitutional, for the reason that the powers therein conferred upon the Comptroller of the Currency are judicial powers, and hence, that the defendant in error was not an officer of the United States authorized to sue in the District Court.

JOHN J. CRAWFORD,
Counsel for Plaintiff in Error.

164-684

Office Supreme Court, U. S.
FILED
DEC 19 1896
JAMES H. MCKENNEY,

Supreme Court of the United States.

No. 497.

JOHN F. BUSHNELL,
Plaintiff in Error,

against

CYRUS A. LELAND, RECEIVER OF THE STATE NATIONAL BANK OF WICHITA, KANSAS,
Defendant in Error.

Supplemental Brief for Plaintiff in Error.

JOHN J. CRAWFORD,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

JOHN F. BUSHNELL,
Plaintiff in Error,

vs.

CYRUS A. LELAND,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

I.

It is an error to suppose that the Comptroller is vested with an absolute discretion in the matter of laying an assessment upon the stockholders, and that all he has to do is "to make up his mind for how much he will sue." He is authorized to enforce the individual liability of the stockholders only "*if necessary to pay the debts of the association.*" (Rev. Stat. U. S., Sec. 5234.) Now, the primary fund for the payment of the debts is the assets of the association; the liability of the stockholders is only secondary. (*Hirshfield* vs. *Bopp*, 145 N. Y., 84, 92; *In re Reciprocity Bank*, 22 N. Y., 9.) The Comptroller is to decide as to the necessity for resorting to the secondary liability; but in making that decision he must proceed upon some data; he must have some evidence upon which he can form a judgment. His decision so made is not with respect to some governmental or public interest; but

merely upon a matter of private right arising between private citizens. The New York Statute committed the decision of this question to the Courts. (*In re Reciprocity Bank*, 22 N. Y., 9.) Is not that the only branch of the government to which it may be properly committed?

It is true that the Comptroller is acting on behalf of the creditors. But what warrant is there in the Constitution to confer upon an executive officer of the United States the authority to act as the agent or representative of private citizens for the purpose of enforcing their claims against other private citizens? The Constitution does not contemplate that one citizen may enforce his rights against another citizen through the medium or instrumentality of the executive branch of the Government.

II.

It is suggested that if the Comptroller should allow invalid claims against the bank, and should attempt to apply the money collected from the stockholders to the payment of those claims, he might be enjoined by a court of equity. But how does this prove that the power given to the Comptroller is not a judicial power? If a court of equity can interfere at all, it must proceed upon the ground that a judicial question is involved. Besides, it is a well-established principle that where a matter is properly committed to the judgment of an executive officer, the courts cannot control the exercise of that judgment. If the authority to pass upon the claims against the bank is properly vested in the Comptroller, his judgment allowing a claim cannot be subject to the revision of a court, in the absence of a statute authorizing an appeal.

The argument, then, instead of showing that the power conferred upon the Comptroller is not judicial, establishes just the contrary.

III.

The question is properly raised at this time.

The statute directs that the Comptroller shall make a ratable dividend *in all such claims as may have been proved to his satisfaction*, or adjudicated in a Court of competent jurisdiction (Rev. Stat., U. S. Sec. 5236). Now, though an injunction might lie in case the Comptroller should attempt to pay claims which were not valid debts of the bank, such a remedy would be inadequate. There is no mode provided by which the stockholder, or the directors or officers of the bank can be heard upon this question. The stockholder has no means of knowing what claims are allowed; and before he could apply for an injunction he would have to get a discovery. Besides, as soon as the money of the stockholder is paid to the Comptroller he may immediately apply it to the payment of the claims he has allowed. And if the stockholder were then to question the action of the Comptroller the latter might well reply that if the stockholder meant to question his right to apply the money to the payment of these claims, he should have raised that question as soon as possible, and before paying his assessment.

IV.

It is not contended by the plaintiff in error that the mere circumstance that there are questions of law and fact to be decided makes the question a judicial one, of which the Courts alone have cognizance. The principle which he invokes is this, that "the power to hear and determine rights of person and property between private citizens is judicial, and can be conferred only in the

Courts." (*State* vs. *Hawkins*, 44 Ohio St., 98, 109; *Kilburn* vs. *Thompson*, 103 U. S., 168, 193.) And this case is within that principle; for the parties in interest are private citizens, and the decision of the Comptroller is upon a question of private right arising between these private citizens.

V.

The District Court did not have jurisdiction of this action for the reason that the Receiver being appointed by the head of a bureau is not an officer of the United States.

It is presumed that the Receiver has proceeded upon the theory that he is an officer of the United States and that the Court has jurisdiction under Section 563, Rev. Stat. U. S., Sub. 4, which confers upon the District Court jurisdiction "of all suits at common law brought by the United States, or by any officer thereof, authorized to sue"; and it is to be said that there are several decisions of the District and Circuit Courts which sustain this view. (Platt *vs.* Beach, 2 Benedict, 303; Stanton *vs.* Wilkeson, 8 Benedict, 357; Price *vs.* Abbott, 17 Fed. Rep., 506.) Some of these decisions were made, however, before the decisions of this Court in United States *vs.* Germaine (99 U. S., 511), and the latter cases have simply followed the earlier decisions. But these cases seem to be irreconcilable with what this Court decided in the Germaine case. In that case it was held that the Commissioner of Pensions is not the head of a department within the meaning of Sec. 2, Article 2, of the Constitution, prescribing by whom officers of the United States may be appointed; and hence, that a civil surgeon appointed by the Commissioner

of Pensions, under Sec. 4777 Rev. Stat. U. S., could not be deemed an officer of the United States. The Court, by Justice Miller, said: "As the defendant here was not appointed by the President or by a court of law, it remains to inquire if the Commissioner of Pensions, by whom he was appointed, is the head of a department, within the meaning of the Constitution, as is argued by the counsel for plaintiffs.

"That instrument was intended to inaugurate a new system of government, and the departments to which it referred were not then in existence. The clause we have cited is to be found in the article relating to the Executive, and the word as there used has reference to the subdivision of the power of the Executive into departments, for the more convenient exercise of that power. One of the definitions of the word given by Worcester is, 'a part or division of the executive government, as the Department of State, or of the Treasury.' Congress recognized this in the act creating these subdivisions of the executive branch by giving to each of them the name of a department. Here we have the Secretary of State, who is by law the head of the Department of State, the Departments of War, Interior, Treasury, &c. And by one of the latest of these statutes reorganizing the Attorney-General's office and placing it on the basis of the others, it is called the Department of Justice. The association of the words 'heads of departments' with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments. Such, also, has been the practice, for it is very well understood that the appointments of the thousands of clerks in the Departments of the Treasury, Interior, and the others, are made by the heads

of those departments, and not by the heads of the bureaus in those departments."

Now, the defendant in error was appointed Receiver, not by the head of a department, but by the Comptroller of the Currency; and the Comptroller of the Currency is no more a head of department than is the Commissioner of Pensions. The language of the statute is: "There shall be in the Department of the Treasury a bureau * * * the chief officer of which bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general direction of the Secretary of the Treasury."

In some of the cases in the Circuit and District Courts it has been suggested that, as the Comptroller performs his duties under the general directions of the Secretary of the Treasury, the concurrence or approval or approbation of the Secretary in the appointment of the Receiver is to be presumed; and that this constitutes an appointment by the head of a department. But this view is at variance with what was held in *United States* vs. *Mouat* (124 U. S., 307), where a similar point was made. Justice Miller said: "In response to this objection to the claimant as an officer of the United States, it is alleged that his appointment as paymaster's clerk, as shown by the finding of facts in the Court of Claims, although made by a paymaster in the United States Navy, has endorsed on it the approval of D. B. Harmony, Acting Secretary of the Navy. If there were any statute which authorized the head of the Navy Department to appoint a paymaster's clerk, the technical argument that the appointment in this case, although actually made by Paymaster Whitehouse, only approved by Harmony as Acting Secretary in a formal way, with the approval of half a dozen other officers, might still be considered sufficient to call this an appointment by the head of that Department. But there is no statute authorizing the Secretary of the Navy to appoint

a paymaster's clerk, nor is there any act requiring his approval of such an appointment, and the regulations of the navy do not seem to require any such appointment or approval for the holding of that position. The claimant, therefore, was not an officer, either appointed by the President, or under the authority of any law vesting such appointment in the head of a Department."

These observations apply with equal pertinency to this case, for there is no provisions which requires the Secretary of the Treasury to approve the appointment of a Receiver of a National Bank (except in the single instance provided for in Rev. Stat. U. S., 5141), and the Secretary has nothing whatever to do with such appointment. The entire matter is within the authority of the Comptroller. He appoints the Receiver whenever he is satisfied that the bank is insolvent; the Receiver makes his report to the Comptroller, and performs all his acts under the direction of the Comptroller (Act, June 30, 1876, Sec. 1; Rev. Stat. U. S., Sec. 5234). It is therefore submitted that under the rule in *United States* vs. *Germaine* and *United States* vs. *Mouat*, he is not an officer of the United States, and hence that the District Court was without jurisdiction.

But as the case is brought to this Court upon the constitutional question, and as a reversal merely upon the ground of want of jurisdiction in the District Court would necessitate a new trial in another Court, where the same constitutional question would be raised again, only to be brought here on another occasion, the Court is asked to decide that question. The affidavit of the Comptroller on the motion to advance shows that the question is likely to arise in a great many other cases, and hence it would appear to be of importance to that officer that it should now be finally disposed of.

JOHN J. CRAWFORD,
Counsel for Plaintiff in Error.

164-684

164-684

DEC 7 1896

JAMES H. MCKENNEY, CLERK.

Supreme Court of the United States,

NUMBER 497 OF OCTOBER TERM, 1896.

JOHN F. BUSHNELL,

Plaintiff in Error,

against

CYRUS A. LELAND,

Defendant in Error.

BRIEF FOR THE DEFENDANT IN ERROR.

Supreme Court of the United States.

JOHN F. BUSHNELL,
Plaintiff in Error,

against

CYRUS A. LELAND,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ABSTRACT OR STATEMENT OF THE CASE.

Error to the District Court for the District of Connecticut, bringing up a judgment which the defendant in error has recovered in that Court against the plaintiff in error:—a judgment for money.

The defendant in error is receiver of the concerns of the State National Bank of Wichita, Kansas, and as such he brought suit, alleging that the Comptroller of the Currency had ascertained and determined that it was necessary to enforce the individual liability of the shareholders, and had made an assessment and requisition upon them for a sum equal to the par value of the stock, and that the plaintiff in error was a shareholder, owning five shares.

The plaintiff in error answered, admitting that he owned the five shares, but denying pretty much everything else.

The case came to trial and the defendant in error, having proved the insolvency of the bank and his appoint-

ment as receiver, put in (p. 10) a paper of which the following is a copy:

"TO ALL WHOM IT MAY CONCERN.

"WHEREAS, upon a proper accounting by the Receiver "heretofore appointed to collect the assets of 'The State "National Bank of Wichita,' Kansas, and upon a valu- "ation of the uncollected assets remaining in his hands, "it appears to my satisfaction that, in order to pay the "debts of such association it is necessary to enforce the "individual liability of the stockholders therefor to the "extent hereinafter mentioned, as prescribed by Sections "5151 and 5234 of the Revised Statutes of the United "States;

"NOW, THEREFORE, by virtue of the authority vested "in me by law, I do hereby make an assessment and "requisition upon the shareholders of the said 'The State "National Bank of Wichita' for One Hundred Thousand "Dollars, to be paid by them ratably on or before the "nineteenth day of December, 1894; and I hereby make "demand upon each and every one of them for One Hun- "dred Dollars upon each and every share of the capital "stock of said association held or owned by them, re- "spectively, at the time of its failure; and I hereby "direct Cyrus A. Leland, the Receiver heretofore ap- "pointed, to take all necessary proceedings, by suit or "otherwise, to enforce to that extent the said individual "liability of the said shareholders.

"IN WITNESS WHEREOF, I have hereto set my hand and "caused my seal of office to be affixed to these presents, at "the City of Washington, in the District of Columbia, "this nineteenth day of November, A. D. 1894.

"JAMES H. ECKELS,
"[L. S.] Comptroller of the Currency."

The plaintiff in error objected to this paper as "irrele-
"vant, immaterial and incompetent, on the ground that
"there is nothing in the complaint and nothing in the evi-
"dence to show that the individual liability of this stock-
"holder is sought to be enforced for the purpose of pay-
"ing any indebtedness due from the bank to the United
"States, or for the purpose of enforcing any lien that the
"government has upon the property of this stockholder,
"and that so far as appears here, the determination of the
"Comptroller relates merely to the claims of private per-
"sons for an indebtedness claimed to be due to them from
"the bank, and *that the Comptroller of the Currency has*
"*no authority to make any such determination or decide*
"*any such question, and that Congress cannot confer*
"*any such authority upon him*" (p. 11).

The defendant in error, having introduced in evidence (p. 11) a notice to the same effect, which had been seasonably served upon the plaintiff in error, rested his case.

The plaintiff in error then moved (p. 12) the Court to instruct the jury to return a verdict for him upon the ground "that there is no evidence in the case to show
"that the action is brought for the purpose of enforcing
"any claim or lien of the United States; that so far as
"appears from the evidence the individual liability of the
"defendant as a stockholder of the State National Bank
"of Wichita is sought to be enforced merely for the pur-
"pose of paying the claims of private parties; that there
"is no evidence in this case to show that such parties are
"creditors of the State National Bank of Wichita, and
"that there is no evidence to show that the fact that these
"parties are creditors of the State National Bank of
"Wichita has ever been established by any decision or
"order of a court of competent jurisdiction; *that so far*
"*as appears the only decision on this point is that of*
"*the Comptroller of the Currency, and that his decision*

"*is of no force for the reason that it is an attempt of* "*an executive officer to exercise judicial functions.*"

The Court denied this motion, and, no further evidence being given, directed a verdict for the defendant in error.

It is the judgment entered upon this verdict which is now brought here by writ of error.

Section 5151 of the Revised Statutes is as follows:

"The shareholders of every national banking associa- "tion shall be held individually responsible, equally and "ratably, and not one for another, for all contracts, "debts, and engagements of such association, *to the ex-* "*tent of the amount of their stock therein, at the par* "*value thereof*, in addition to the amount invested in "such shares."

Section 5234 of the Revised Statutes is as follows:

"On becoming satisfied, as specified in Sections fifty- "two hundred and twenty-six and fifty-two hundred and "twenty-seven, that any association has refused to "pay its circulating notes as therein mentioned, and is "in default, the Comptroller of the Currency may "forthwith appoint a receiver, and require of him such "bond and security as he deems proper. *Such receiver*, "*under the direction of the Comptroller*, shall take pos- "session of the books, records and assets of every de- "scription of such association, collect all debts, dues and "claims belonging to it and, upon the order of a court of "record of competent jurisdiction, may sell or compound "all bad or doubtful debts, and, on a like order, may sell "all the real and personal property of such association, on "such terms as the Court shall direct; and *may, if* "*necessary to pay the debts of such association, enforce* "*the individual liability of the stockholders.*"

Section 5236 is in the following words:

"Sec. 5236. From time to time, after full provision has "been first made for refunding to the United States any "deficiency in redeeming the notes of such association, the "Comptroller *shall make a ratable dividend* of the money "so paid over to him by such receiver *on all such claims* "*as may have been proved to his satisfaction or adjudi-* "*cated in a court of competent jurisdiction*, and, as the "proceeds of the assets of such association are paid "over to him, shall make further dividends on all claims "previously proved or adjudicated; *and the remainder of* "*the proceeds, if any, shall be paid over to the share-* "*holders of such association, or their legal representa-* "*tives, in proportion to the stock by them respectively* "*held.*"

Article I of the Constitution contains the following:

"SECTION. 8. The Congress shall have power

* * * * * *

"To constitute Tribunals inferior to the supreme "Court;"

Article III of the Constitution contains the following:—

"SECTION. 1. The judicial Power of the United States, "shall be vested in one supreme Court, and in such in- "ferior Courts as the Congress may from time to time "ordain and establish. The Judges, both of the supreme "and inferior Courts, shall hold their Offices during good "Behavior, and shall, at stated Times, receive for their "Services, a Compensation, which shall not be dimin- "ished during their Continuance in Office.

"SECTION. 2. The judicial Power shall extend to all "Cases, in Law and Equity, arising under this Constitu- "tion, the Laws of the United States, and Treaties made,

"the United States, whose Appointments are not herein "otherwise provided for, and which shall be established "by Law: but the Congress may by Law vest the Ap- "pointment of such inferior Officers, as they think "proper, in the President alone, in the Courts of Law, "or in the Heads of Departments."

Article V. of the Amendments is as follows:

"(ARTICLE V.)

"No person shall be held to answer for a capital, or "otherwise infamous crime, unless on a presentment or "indictment of a Grand Jury, except in cases arising in "the land or naval forces, or in the Militia, when in "actual service in time of War or public danger; nor "shall any person be subject for the same offence to be "twice put in jeopardy of life or limb; nor shall be com- "pelled in any Criminal Case to be a witness against "himself, nor be deprived of life, liberty, or property, "without due process of law; nor shall private property "be taken for public use, without just compensation."

BRIEF OF THE ARGUMENT.

I.

The plaintiff in error, when he took his stock, by that act entered into a contract that the comptroller of the currency might, upon the events which have happened, call for as much money as he should see fit—not exceeding an amount equal to the par of the stock—it being provided that if too much were called for, the excess would be returned.

The Act of Congress provides as follows:

R. S., Section 5151.

"The shareholders of every national banking association "shall be held individually responsible, equally and rata- "bly, and not one for another, *for all contracts, debts* "*and engagements of such association*, to the extent of "the amount of their stock therein, at the par value "thereof, in addition to the amount invested in such "shares;"

This section fixes the liability of the shareholder. He is liable for "*all contracts, debts, and engagements*" of the bank; and, it is quite plain, that, if this provision stood alone, any creditor who had a debt of the bank which was due could directly sue each shareholder for his equal and ratable proportion of that debt without using his remedy against the bank itself, or concurrently with using it; thus pursuing all his remedies at the same time until he got satisfaction.

To recover in such an action he would simply have to

prove his debt against the bank, the amount of the shareholder's stock, and the total amount of stock.

But there is other statutory provision. Section 5234 of the Revised Statutes is as follows:—

"SEC. 5234. On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, *under the direction of the Comptroller*, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; *and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders.* Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

And the Court has construed the effect of the whole act to be that the liability cannot be enforced by the creditors, but only by the receiver.

Kennedy vs. *Gibson*, 8 Wall., 498. The court said, by Mr. Justice Swayne (p. 506): "The claims of creditors may be proved before the comptroller, or established by "suit against the association. Creditors must seek their remedy through the "comptroller in the mode prescribed by the statute; *they cannot proceed directly "in their own names against the stockholders* or debtors *of the bank*. The "receiver is the statutory assignee of the association, and is the proper party to "institute all suits; they may be brought both at law and in equity, in his name, "or in the name of the association for his use. He represents both the creditors "and the association, and when he sues in his own name it is not necessary to "make either a party to the suit."

And again, by Mr. Justice Clifford, in *Bank of Bethel* vs. *Pahquioque Bank*, 14 Wall., 388, 401.

And the Court has also held, construing the whole act, that the receiver can enforce the liability *only upon the order of the Comptroller*.

Kennedy vs. *Gibson*, 8 Wall., 498. In that case the receiver filed a bill to enforce the liability, and a demurrer to the bill was sustained because there was no allegation of any order or direction by the comptroller.

It is thus settled, that the liability can only be enforced by the receiver, after direction so to do from the Comptroller.

But this of course does not affect the *extent* of the liability. It only regulates *the method of its enforcement*. The liability of the shareholder is still to pay his equal and ratable share of *all the "contracts, debts, and engagements"* of the bank up to an amount equal to the par value of his stock.

If the plaintiff below, in addition to proving the direction of the Comptroller, had proved the amount of the liabilities of the bank and the amount of its stock, as it may be supposed he could easily have done, no such question, as is now raised in this case, could have been raised. He would have proved his authority to enforce the liability by proving the order of the Comptroller, and he would have established what that liability was by proving that the aggregate of the debts exceeded the amount of the stock.

But he did not make any such proof.

He simply proved the determination of the Comptroller that the liability of the shareholders be enforced up to its full amount, and his direction to the receiver to go on and enforce it.

In resting his case upon this, however, the plaintiff acted in strict obedience to the rule which has been thoroughly established by the repeated adjudications of the Court.

Section 5236 of the Revised Statutes is all follows:

"SEC. 5236. From time to time, after full provision has

" been first made for refunding to the United States any " deficiency in redeeming the notes of such association, " the Comptroller shall make a ratable dividend of the " money so paid over to him by such receiver on all such " claims as may have been proved to his satisfaction or " adjudicated in a court of competent jurisdiction, and, " as the proceeds of the assets of such association are " paid over to him, shall make further dividends on all " claims previously proved or adjudicated; *and the re-* " *mainder of the proceeds, if any, shall be paid over to* " *the shareholders of such association, or their legal* " *representatives, in proportion to the stock by them* " *respectively held.*"

In *Kennedy* vs. *Gibson*, 8 Wall., 498, the Court said, by Mr. Justice Swayne:

(P. 505.) " The receiver is the instrument of the Comp- " troller. He is appointed by the Comptroller, and the " power of appointment carries with it the power of re- " moval. It is for the Comptroller to decide when it is " necessary to institute proceedings against the stock- " holders to enforce their personal liability, and whether " the whole or a part, and if only a part, how much, shall " be collected. *These questions are referred to his judg-* " *ment and discretion, and his determination is conclu-* " *sive. The stockholders cannot controvert it. It is not* " *to be questioned in the litigation that may ensue. He* " *may make it at such time as he may deem proper, and* " *upon such data as shall be satisfactory to him.* This " action on his part is indispensable, whenever the personal " liability of the stockholders is sought to be enforced, " and must precede the institution of suit by the receiver. " The fact must be distinctly averred in all such cases, and " if put in issue must be proved.

" The liability of the stockholders is several and not

"joint. The limit of their liability is the par of the stock "held by each one. Where the whole amount is sought "to be recovered the proceeding must be at law. Where "less is required the proceeding may be in equity, and in "such case an interlocutory decree may be taken for "contribution, and the case may stand over for the further "action of the court—if such action should subsequently "prove to be necessary—until the full amount of the lia- "bility is exhausted. *It would be attended with injurious "consequences to forbid action against the stockholders "until the precise amount necessary to be collected shall "be formally ascertained. This would greatly protract "the final settlement, and might be attended with large "losses by insolvency and otherwise in the intervening "time. The amount must depend in part upon the "solvency of the debtors and the validity of the claims. "Time will be consumed in the application of these "tests, and the results in many cases cannot be foreseen. "The same remarks apply to the forced collections from "the stockholders. A speedy adjustment is necessary "to the efficiency and utility of the law; the interests of "the creditors require it, and it was the obvious policy "and purpose of Congress to give it. If too much be col- "lected, it is provided by the statute, that any surplus "which may remain after satisfying all demands against "the association, shall be paid over to the stock- "holders. It is better that they should pay more than "may prove to be needed than that the evils of delay "should be encountered.*"

In *Casey* vs. *Galli*, 94 U. S., 673, the declaration alleged that the Comptroller had required the receiver to enforce the liability of the stockholders to the amount of the par value of the stock. It did *not* allege that the liabilities of the bank equalled the amount of the par value of the stock. The defendant demurred.

The Court said, by Mr. Justice Swayne:

(P. 677.) "The defendant demurred to the declaration, "and assigned the following causes:

"1. That the defendant is bound to contribute ratably, "and that the proper amount can be ascertained only in "equity.

"2. That the defendant is bound to contribute ratably "to pay a large sum; that this sum is not stated in the "declaration, and hence what would be ratable and proper "does not appear.

"3. That the obligation of the defendant is to pay into "the hands of the comptroller of the currency a ratable "proportion of the debts of the association proved before "him, and that the declaration does not show that any "debts had been so proved.

"4. That the declaration demands a larger sum than "the defendant is required by the statute to pay, and also "an additional sum by way of interest.

"In regard to the first three of these objections, it is "sufficient to say that *Kennedy* v. *Gibson and Others*, "8 Wall., 498, is conclusive against them. *It is there "said that the amount to be paid rests in the judgment "and discretion of the comptroller; that his determina- "tion cannot be controverted by the stockholders in suits "against them;* and that, when the order is to collect "the full amount of the par of the stock, the suit must "be at law. It is unnecessary to reproduce the reasoning "of the court in support of these propositions. *The sum "to be paid being liquidated, and due and payable when "the comptroller's order was made*, it follows that the "amount bears interest from the date of the order. Other- "wise there would be no motive to pay promptly, and no "equality between those who should pay then and those "who should pay at the end of a protracted litigation."

Afterwards the defendant filed certain special pleas,

And the Court said, by Mr. Justice Swayne (p. 600): "Since the opinion of the court was delivered in this case, "the defendant obtained leave to plead further, and has "filed three pleas. They are:—

"*First*, *Nil debet*, upon which the plaintiff has taken "issue.

"*Second*, That the comptroller of the currency has "'determined and decided to exact from the defendant, "'and from a number of stockholders of said National "'Banking Association less than the whole, such sums "'of money as would suffice to pay all the debts and "'liabilities of the said National Banking Association, "'with the intent and purpose to compel this defendant "'and others of said shareholders who may be solvent to "'contribute the entire sum necessary to pay the debts "'and liabilities of the said National Banking Associa-"'tion, without any contribution from those who are "'insolvent.'"

"It is a sufficient objection to this plea that the comp-"troller has ordered that each stockholder shall pay to "the receiver the par of his stock. *This order cannot* "*be controverted in a suit against the stockholder. It is* "*conclusive upon him, and makes it his duty to pay.* "*Kennedy* v. *Gibson and Others*, 8 Wall., 498. What "may be done or intended with respect to other stock-"holders is immaterial in his case.

"The plea is, also, manifestly bad for vagueness and "uncertainty.

"*Third, That the comptroller has decided to pay a* "*large amount of claims against the bank for which the* "*bank is not responsible, and that aside from these* "*claims, there are means enough already in his hands* "*to meet the liabilities of the bank.*

"*The same objection lies to this plea as to the preced-*"*ing one, and the same authority applies.* If the re-

"ceiver intends to violate, or shall violate, his duty in "discharging the trust confided to him, the remedy must "be sought in another proceeding. It cannot avail the "defendant in this action."

In *United States* vs. *Knox*, 102 U. S., 422,

The Court said, by Mr. Justice Swayne (p. 426): "Nothing in this opinion is intended in any wise to affect "the authority of *Kennedy* v. *Gibson and Others*, 8 "Wall., 498, and *Casey* v. *Galli*, 94 U. S., 673. On the "contrary, we approve and reaffirm the rule laid down in "those cases."

The meaning of the statute has thus been, by the Court, established to be that the Comptroller may call for as much money as he sees fit—all at once, or in successive calls (U. S. *vs.* Knox, 102 U. S., 422)—provided that in the aggregate he shall not call for an amount greater than the par of the stock; that the amount is due as soon as calls, so that interest runs from that time; and if he calls for too much, the excess is returned.

This being the established meaning of the statute, it follows—that when the defendant took his stock he contracted with reference to that meaning, and it follows:

That he has entered into a contract that the Comptroller may do the very thing which he has done.

II.

The determination of the Comptroller is evidence, and the Congress has the constitutional power to make it evidence.

1. *The determination of the Comptroller is evidence.*

The attention of the Court is again called to the text of the act of Congress.

The text of that portion of the act is as follows:

"The shareholders of every national banking associa-
"tion shall be held individually responsible, equally and
"ratably, and not one for another, for all contracts, debts
"and engagements of such association, to the extent of
"the amount of their stock therein, at the par value
"thereof, in addition to the amount invested in such
"shares" (R. S., § 5151).

It has already been shown from the decisions of the Court that this liability can be enforced only by the receiver, after having been directed to do so by the Comptroller.

If the receiver had proved that the liabilities of the bank exceeded the assets *plus* the par of the capital stock, his case would have been impregnable.

Instead of this he put in the determination of the Comptroller.

Construing the above act of Congress, the Court, in *United States* vs. *Knox*, 102 U. S., 422, said by Mr. Justice Swayne (p. 425):

"In the process to be pursued to fix the amount of the
"separate liability of each of the shareholders it is neces-
"sary to ascertain, 1, the whole amount of the par value
"of all the stock held by all the shareholders; 2, the
"amount of the deficit to be paid after exhausting all the

"assets of the bank; 3, then to apply the rule that each "shareholder shall contribute such sum as will bear the "same proportion to the whole amount of the deficit as "his stock bears to the whole amount of the capital stock "of the bank at its par value. There is a limitation to "this liability. It cannot in the aggregate exceed the "entire amount of the par value of all the stock."

"The insolvency of one stockholder, or his being beyond "the jurisdiction of the court, does not in any wise affect "the liability of another; and if the bank itself, in such "case, holds any of its stock, it is regarded in all respects "as if such stock were in the hands of a natural person, "and the extent of the several liability of the other stock-"holders is computed accordingly. *Crease* v. *Babcock*, "10 Metc. (Mass.), 525.

"These rules have been applied in several well-con-"sidered judgments of other courts, where the words we "have italicised" (*equally and ratably*) "were not in "the statutes upon which they proceeded. We have "found no case in conflict with them. See *Crease* v. "*Babcock*, *supra*; *Atwood* v. *R. I. Agricultural Bank*, "1 R. I. 376; *In the Matter of the Hollister Bank*, 27 "N. Y. 393; *Adkins* v. *Thornton*, 19 Ga. 325; *Robinson* "v. *Lane*, id, 337; *Wiswell* v. *Starr*, 48 Me. 401. See "also Morse on Banking, 503.

"Although assessments made by the comptroller, under "the circumstances of the first assessment in this case, "and all other assessments, successive or otherwise, not "exceeding the par value of all the stock of the bank, "are conclusive upon the stockholders, *yet if he were to* "*attempt to enforce one made, clearly and palpably,* "*contrary to the views we have expressed, it cannot be* "*doubted that a court of equity, if its aid were invoked,* "*would promptly restrain him by injunction.*

"Nothing in this opinion is intended in any wise to

"affect the authority of *Kennedy* v. *Gibson and others*, "8 Wall. 498, and *Casey* v. *Galli*, 94 U. S. 673. On "the contrary, we approve and reaffirm the rule laid down "in those cases."

It follows, that the determination of the Comptroller is not a judicial determination, since he can be restrained by injunction, but it is good as evidence, at any rate. And that is all that is needed in this case.

2. It "is within the acknowledged power of every legis- "lature to prescribe the evidence which shall be received, "and the effect of that evidence, in the courts of its own "government."

By Mr. Justice Gray in *Fong Yue Ting* vs. *United States*, 149 U. S., 698; citing, among other cases, *Pillow* vs. *Roberts*, 13 How., 472, 476.

III.

The determination of the comptroller, even though it were a judicial act, would not be an exercise of the judicial power of the United States, and therefore is not prohibited by the Constitution.

The applicable provisions of the Constitution are as follows:—

From Article I.

"SECTION. 8. The Congress shall have Power

* * * * *

"To constitute Tribunals inferior to the supreme "Court."

From Article III.

"SECTION. 1. The judicial Power of the United States "shall be vested in one supreme Court, and in such "inferior Courts as the Congress may from time to time "ordain and establish. The Judges, both of the supreme "and inferior Courts, shall hold their Offices during good "Behavior, and shall, at stated Times, receive for their "Services, a Compensation, which shall not be diminished during their Continuance in Office.

"SECTION. 2. The judicial Power shall extend to all "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, "or which shall be made, under their Authority;—to all "Cases affecting Ambassadors, other public Ministers, "and Consuls;—to all Cases of Admiralty and maritime "jurisdiction;—to Controversies to which the United "States shall be a party;—to Controversies between two "or more States;—between a State and Citizens of another

" State;—between Citizens of different States;—between " Citizens of the same State claiming Lands under Grants " of different States, and between a State, or the Citizens " thereof, and foreign States, Citizens, or Subjects."

In *Benner* v. *Porter*, 9 How., 235, the Court, by Mr. Justice Nelson, substantially quoting from *The American Insurance Company* v. *Cantor*, 1 Pet., 511, 546, said:

(P. 244) "Congress must not only ordain and establish inferior courts within a " State and prescribe their jurisdiction, *but the judges appointed to administer* " *them must possess the constitutional tenure of office before they can become* " *invested with any portion of the judicial power of the Union.* There is no " exception to this rule in the Constitution. *The Territorial courts, therefore,* " *were not courts in which the judicial power conferred by the Constitution on* " *the Federal government could be deposited. They were incapable of receiving* " *it, as the tenure of the incumbents was but for four years.* (1 Peters, 546.) " Neither were they organized by Congress under the Constitution, as they were " invested with powers and jurisdiction which that body were incapable of confer- " ring upon a court within the limits of a State."

The same has been held in

United States v. *Ferreira*, 13 How., 40.
United States v. *Ritchie*, 17 How., 534.
Orchard v. *Hughes*, 1 Wall., 77.
Reynolds v. *United States*, 98 U. S., 154.
McAllister v. *United States*, 141 U. S., 174.
United States v. *Coe*, 155 U. S., 76.
Steamer Coquitlam v. *United States*, 163 U. S., 351.

And it follows that the Comptroller of the Currency, since his term of office is but for five years, is not one of the "tribunals inferior to the Supreme Court" which the Congress is empowered to "constitute," and that he cannot therefore exercise any of "the judicial power of the United States."

Although what the comptroller was doing was under the laws of the United States, there was not a "case" before him within the meaning of the Constitution.

Mr. Marshall's speech on the case of Jonathan Robbins, Bee, 277; 5 Wheat., appx., 16, 17. Approved in *Fong Yue Ting* vs. *United States*, 149 U. S., 698, 714.

Mr. Marshall—

" By the constitution, the judicial power of the United " States is extended to all *cases in law and equity*, arising " under the constitution, laws and treaties of the United " States; but the resolutions declare the judicial power " to extend to *all questions* arising under the constitution,

"treaties and laws of the United States. The difference "between the constitution and the resolutions was "material and apparent. A case in law or equity was a "term well understood, and of limited signification. It "was a controversy between parties which had taken a "shape for judicial decision. If the judicial power ex- "tended to every *question* under the constitution, it "would involve almost every subject proper for legislative "discussion and decision; if to every *question* under the "laws and treaties of the United States, it would involve "almost every subject on which the executive could act. "The division of power which the gentleman had stated "could exist no longer, and the other departments would "be swallowed up by the judiciary."

"By extending the judicial power to all *cases in law* "*and equity*, the constitution had never been understood "to confer on that department any political power what- "ever. To come within this description, a question must "assume a legal form for forensic litigation and judicial "decision. There must be parties to come into court, "who can be reached by process, and bound by its power; "whose rights admit of ultimate decision by a tribunal to "which they are bound to submit.

"A case in law or equity proper for judicial decision "may arise under a treaty, where the rights of individuals "acquired or secured by a treaty are to be asserted or "defended in court: As under the fourth or sixth article "of the treaty of peace with Great Britain, or under those "articles of our late treaties with France, Prussia, and "other nations, which secure to the subjects of those "nations their property within the United States; or, as "would be an article which instead of stipulating to de- "liver up an offender, should stipulate his punishment, "provided the case was punishable by the laws and in "the courts of the United States. But the judicial power

"cannot extend to political compacts; as, the establish-
"ment of the boundary line between the American and
"British dominions; the case of the late guarantee in
"our treaty with France; or the case of the delivery of
"a murderer under the twenty-seventh article of our
"present treaty with Britain."

Mr. Justice Story, in his "Commentaries on the Con-
"stitution," said:

"§ 1646. Another inquiry may be, what constitutes a
"*case* within the meaning of this clause? It is clear that
"the judicial department is authorized to exercise juris-
"diction to the full extent of the constitution, laws, and
"treaties of the United States, whenever any question
"respecting them shall assume such a form that the
"judicial power is capable of acting upon it. When it has
"assumed such a form, it then becomes a case; and then,
"*and not till then*, the judicial power attaches to it. A
"case, then, in the sense of this clause of the Constitu-
"tion, arises when some subject touching the Constitu-
"tion, laws, or treaties of the United States is submitted
"to the courts by a party who asserts his rights in the
"forms prescribed by law. In other words, a case is a suit in
"law or equity, instituted according to the regular course
"of judicial proceedings; and when it involves any ques-
"tion arising under the Constitution, laws, or treaties of
"the United States, it is within the judicial power con-
"fided to the Union."

In *Interstate Commerce Com.* vs. *Brinson*, 154 U. S., 447, the Court said by Mr. Justice Harlan (p. 475):

"What is a case or controversy to which, under the
"Constitution, the judicial power of the United States
"extends? Referring to the clauses of that instrument,
"which extends the judicial power of the United States to
"all cases in law and equity arising under the Constitution,

" the laws of the United States, and treaties made or that
" shall be made under their authority, this Court, speak-
" ing by Chief Justice Marshall, has said:

" ' This clause (3d article) enables the judicial depart-
" ' ment to receive jurisdiction to the full extent of the
" ' Constitution, laws, and treaties of the United States,
" ' when any question respecting them shall assume such a
" ' form that the judicial power is capable of acting on it.
" ' That power is capable of acting only when the subject is
" ' submitted to it by a party who asserts his rights in the
" ' form prescribed by law. It then becomes a case, and the
" ' Constitution declares, that the judicial power shall ex-
" ' tend to all cases arising under the Constitution, laws,
" ' and treaties of the United States.'

" *Osborn* v. *Bank of the United States*, 9 Wheat., 738,
" 819. And in *Murray* v. *Hoboken Co.*, 18 How., 272,
" 284, Mr. Justice Curtis, after observing that Congress
" cannot withdraw from judicial cognizance any matter
" which, from its nature, is the subject of a suit at the
" common law, or in equity, or admiralty, nor, on the
" other hand, bring under judicial power a matter which,
" from its nature, is not a subject for judicial determina-
" tion, said: ' At the same time there are matters involv-
" ' ing public rights which may be presented in such form
" ' that the judicial power is capable of acting on them,
" ' and which are susceptible of judicial determination,
" ' but which Congress may or may not bring within the
" ' cognizance of the courts of the United States, as it
" ' may deem proper.' So, in *Smith* v. *Adams*, 130
" U. S., 173, Mr. Justice Field, speaking for the court,
" said that the terms ' cases ' and ' controversies ' in the
" Constitution embraced ' the claims or contentions of
" ' litigants brought before the courts for adjudication by
" ' regular proceedings established for the protection or

" 'enforcement of rights, or the prevention, redress, or " 'punishment of wrongs.' "

And it follows, that whatever else he has done, the Comptroller has not exercised any of the "judicial Power " of the United States."

It is thus certain that the determination of the Comptroller is not a thing *forbidden* by the Constitution—even though in the making of it he acted judicially—that is to say, that the making of it involved "*the exercise of judgment upon law and fact.*" *Murray* v. *Hoboken Co.*, 18 How., 272, 280.

It remains to consider whether:

1. To authorize such thing to be done is among the powers *granted* to the Congress, and

2. Whether it is *due process of law* within the meaning of the fifth amendment, or, more exactly, whether it is forbidden by the provision in the fifth amendment that no "person" shall "be deprived of life, liberty, or property, without due process of law."

IV.

Assuming the determination of the Comptroller to have been a *judicial* act—*i. e.*, an act which involved the exercise of judgment upon law and fact—it was nevertheless within the power of the Congress to authorize him to make it, provided, of course, that it was a part of the machinery for the carrying on of any of the concerns which are within the powers granted to the Congress.

This is not only thoroughly well settled by this Court, but it is quite plain that it must be so. Otherwise the powers expressly granted to the Congress could not be exercised.

In *Murray* vs. *Hoboken Co.*, 18 How., 272, 280, the Court said, by Mr. Justice Curtis:

"That the auditing of accounts of a receiver of public "moneys may be, in an enlarged sense, a judicial act, must "be admitted. So are all those duties the performance "of which involves an inquiry into the existence of facts "and the application to them of rules of law. In this "sense the act of the President in calling out the militia "under the Act of 1795 (12 Wheat., 19), or of a commis- "sioner who makes a certificate for the extradition of a "criminal, under a treaty, is judicial. But it is not suf- "ficient to bring such matters under the judicial power, "that they involve the exercise of judgment upon law "and fact."

And the Court then proceeded to hold that the exercise of such powers was constitutional.

In *Fong Yue Ting* vs. U. S., 149 U. S., 698, the Court said, by Mr. Justice Gray:

(P. 714.) "Congress, having the right, as it may see fit, "to expel aliens of a particular class, or to permit them "to remain, has undoubtedly the right to provide a sys- "tem of registration and identification of the members of "that class within the country, and to take all proper "means to carry out the system which it provides.

"It is no new thing for the law-making power, acting "either through treaties made by the President and Senate, "or by the more common method of acts of Congress, to "submit the decision of questions, not necessarily of judi- "cial cognizance, either to the final determination of ex- "ecutive officers, or to the decision of such officers in the "first instance, with such opportunity for judicial review "of their action as Congress may see fit to authorize or "permit.

"For instance, the surrender, pursuant to treaty stipu- "lations, of persons residing or found in this country, and "charged with crime in another, may be made by the "executive authority of the President alone, when no "provision has been made by treaty or statute for an "examination of the case by a judge or magistrate. "Such was the case of Jonathan Robbins, under Article "27 of the Treaty with Great Britain of 1794, in which "the President's power in this regard was demonstrated "in the masterly and conclusive argument of John "Marshall in the House of Representatives, 8 Stat., 129; "Wharton's State Trials, 392; Bee, 286; 5 Wheat. appx., "3. But provision may be made, as it has been by later "Acts of Congress, for a preliminary examination before "a judge or commissioner; and in such case the suffi- "ciency of the evidence on which he acts cannot be re- "viewed by any other tribunal except as permitted by "statute. Act of August 12, 1848, c. 167, 9 Stat. 302;

" Rev. Stat., §§ 5270–5274; *Ex Parte Metzger*, 5 How.,
" 176; *Benson* v. *McMahon*, 127 U. S., 457; *In re Oteiza*,
" 136 U. S., 330.

" So claims to recover back duties illegally exacted on
" imports may, if Congress so provides, be finally deter-
" mined by the Secretary of the Treasury, *Cary* vs. *Cur-*
" *tis*, 3 How., 236; *Curtis* vs. *Fielder*, 2 Black, 461,
" 478, 479; *Amson* vs. *Murphy*, 109 U. S., 238, 240.
" But Congress may, as it did for long periods, permit
" them to be tried by suit against the collector of cus-
" toms, or it may, as by the existing statutes, provide
" for their determination by a board of general appraisers,
" and allow the decisions of that board to be reviewed by
" the Courts in such particulars only as may be prescribed
" by law. Act of June 10, 1890, c. 407, §§ 14, 15, 25, 26,
" Stat. 137, 138, 141; *In re Fassett*, 142 U. S., 479, 486,
" 487; *Passavant* vs. *United States*, 148 U. S., 214.

" To repeat the careful and weighty words uttered by
" Mr. Justice Curtis, in delivering a unanimous judgment
" of this Court upon the question what is due process of
" law: ' To avoid misconstruction upon so grave a subject
" ' we think it proper to state that we do not consider
" ' Congress can either withdraw from judicial cognizance
" ' any matter which, from its nature, is the subject of a
" ' suit at the common law, or in equity, or admiralty;
" ' nor, on the other hand, can it bring under the judicial
" ' power a matter which, from its nature, is not a subject
" ' for judicial determination. At the same time there are
" ' matters, involving public rights, which may be pre-
" ' sented in such form that the judicial power is capable
" ' of acting on them, and which are susceptible of judi-
" ' cial determination, but which Congress may or may
" ' not bring within the cognizance of the Courts of the
" ' United States, as it may deem proper.' *Murray* vs.
" *Hoboken Co.*, 18 How., 272, 284."

In Mr. Marshall's speech on Robbins' case, already quoted, he said (Bee, 285, 5 Wheat. appx., 25):

"The points of law which must have been decided are "stated by the gentleman from Pennsylvania to be, first, "a question whether the offense was committed within "the British jurisdiction; and, secondly, whether the "crime charged was comprehended within the treaty.

"It is true, sir, these points of law must have occurred, "and must have been decided; but it by no means fol- "lows that they could only have been decided in court. "A variety of legal questions must present themselves "in the performance of every part of executive duty, but "these questions are not therefore to be decided in "court."

* * * * * * *

"When the gentleman has proved that these are ques- "tions of law, and that they must have been decided by "the president, he has not advanced a single step toward "proving that they were improper for executive de- "cision."

Instances of such judicial acts are, of course, almost innumerable.

As early as April, 1791, the Circuit Court for the District of New York considered the matters arising under the "Act to provide for the settlement of the claims of "widows and orphans," etc. That act required the Circuit Courts to examine claims for pensions; to determine the amount that would be an equivalent for the disability incurred, and to certify their opinion to the Secretary of War; and it authorizes the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension and report the case to Congress. Mr. Chief Justice Jay, Mr. Justice Cushing and Judge Duane, who held that the Court determined that this was a duty which Congress had not the power to impose upon the Court, but that

"as the objects of this act are exceedingly benevolent, "and do real honor to the humanity and justice of Con- "gress; and as the Judges desire to manifest, on all "proper occasions, and in every proper manner, their "high respect for the National Legislature, *they will* "*execute this act in the capacity of commissioners.*" *Note to Hayburn's case*, 2 Dal., 410.

The most striking illustration is perhaps the courts martial.

The matters which come before these courts usually come in the form of a *case*, and yet their proceedings are not the exercise of the "judicial power of the United "States," because, although they arise under the laws of the United States, they are not cases "in Law" or "Equity."

They are sustained solely upon the grant of power to the Congress "To make Rules for the Government and "Regulation of the land and naval Forces;"

Rawle on the Constitution, 209.

> COURTS MARTIAL:
>
> "There is another species of courts having a special jurisdiction, from which "trial by jury is also excluded, yet whose power extends to pecuniary mulcts, "deprivation of office, imprisonment, personal chastisement, and even loss of life. "It will be at once perceived that we allude to courts martial.
>
> "Although not expressly mentioned in the Constitution, the power to institute "them is unquestionably given by the authority vested in Congress to make rules "for the government and regulation of the land and naval forces, and the amend- "ment heretofore noticed, which, before a person shall be held to answer for a "capital or otherwise infamous crime, requires a presentment or indictment by a "grand jury, except the land and naval forces, and the militia when in actual "service in time of war or public danger, thereby indirectly recognizing the estab- "lishment and the efficient powers of courts martial."

2. *The Patent Office.*

Under the provision of the Constitution already quoted giving power to the Congress to promote science and useful arts, an act was passed in 1836 (Chapter 357, 5 Stat., 117) creating the office of Commissioner of Patents, and

by Section 7 of that act power to rule upon the originality of the invention was given to him. The system thus originated has been elaborated and extended, and now, on the questions of fact and law, appeals lie from the primary examiners to the board of examiners-in-chief (R. S., Sec. 4909) and from their decision to the Commissioner (R. S., Sec. 4910) and from his decision, except in cases of interferences, to the Supreme Court of the District of Columbia (R. S., Sec. 4911). The questions thus decided, are exactly the same, and are decided upon proofs taken in exactly the same way as in cases originated by bills in equity for infringement filed in the Circuit Courts of the United States.

The old Patent Office reports, beginning in 1837 and ending with 1872, embrace sixty-nine volumes. The Official Gazette, begun in 1873, has passed its seventy-fourth volume, the volumes being of about 1,900 pages each.

3. *The Pension Department.*

Proofs are taken in the ordinary way and witnesses are compelled to attend by subpœna issued by the Judges of the United States, and an appeal lies from the determination of the Commissioner of Pensions to the Secretary of the Interior.

The reports of the decisions, begun only in 1887, fill seven volumes.

4. *The Land Office.*

Appeal lies from the decision of the Commissioner to the Secretary of the Interior and the action is judicial in its nature.

United States vs. *Schurz*, 102 U. S., 378, 401.
Noble vs. *Union River Logging Company*, 147 U. S., 165.
Weeks vs. *Bridgman*, 159 U. S., 541.

The reports of these decisions, begun in 1881, have passed the nineteenth volume.

5. *The Comptrollers of the Treasury.*

Appeals lie to the First Comptroller from the Sixth Auditor (R. S., Sec. 270).

And the action of the Comptrollers and the Auditors is judicial in its nature.

Murray vs. *Hoboken Co.*, 18 How., 272, 280.
United States vs. *Kaufman*, 96 U. S., 567.

The published reports of the First Comptroller's Decisions, begun but in 1880, fill seven volumes.

The digest only of the Second Comptroller's decisions fills three volumes.

6. *The Interstate Commerce Commission* acts judicially upon proofs taken just as in courts of equity, and its decisions, thus far, fill six volumes.

7. *The Department of Migration* acts judicially. Appeals lie from the Inspectors to the Commissioner and from the Commissioner to the Secretary of the Treasury, and their determination is conclusive.

Nishimura Ekiu vs. *United States*, 142 U. S., 651.
Fong Yue Ting vs. *United States*, 149 U. S., 698.

8. In the river and harbor bill of 1888 there was contained a provision giving to the Secretary of War power, when he had "reason to believe that any railroad or "other bridge was an obstruction to any of the navigable "waters of the United States," to order its removal. The system thus originated has been changed and somewhat extended, and an elaborate machinery has grown up ex-

tending all over the United States. When a complaint is made, the matter is first heard by the engineer officer in charge of that district. It then goes to the Chief of Engineers, and finally to the Secretary, and the action is judicial in its nature.

The power is supposed to be sustained by the grant of power to the Congress, above quoted, to "*regulate* Com- "merce with Foreign Nations, among the several States "and with the Indian Tribes."

It might perhaps be quoted whether judicial action by the Secretary of War is a *regulation* of commerce *by the Congress*, and whether it be not a *delegation* of that power by the Congress; but there is no doubt of the extent of the system.

9. The President acts judicially when he calls out the militia under such acts as the Act of Congress of 1795 (Chapter 101)—

Martin vs. *Mott*, 12 Wheat., 19,

and when he surrenders a criminal on extradition.

Murray vs. *Hoboken Co.*, 18 How., 272, 280.

10. And there is a vast variety of matters, judicial in their nature, which arise under treaties—the adjudication upon claims and such things—in which the Commissioners and other officers act judicially.

United States vs. *Ferreira*, 13 How., 40.

In short, to hold that power to act judicially cannot be conferred by the Congress upon executive officers would disrupt the government.

11. *The national banking system* is based upon the grant to the Congress of the powers, above quoted, to lay and collect taxes; to borrow money; to regulate com-

merce; to declare and conduct a war, and to raise and support armies and navies.

M'Culloch vs. *Maryland*. 4 Wheat., 316.

By Mr. Chief Justice Marshall (p. 407): "Although, among the enumerated 'powers of government we do not find the word 'bank' or 'incorporation,' we "find the great powers to lay and collect taxes; to borrow money; to regulate "commerce; to declare and conduct a war; and to raise and support armies and "navies. The sword and the purse, all the external relations, and no inconsider-"able portion of the industry of the nation, are entrusted to its government."

Also

Osborn vs. *Bank of the United States*. 9 Wheat., 823.

There are about thirty-five hundred national banks.

Of this vast system the Comptroller of the Currency is the head.

The power to create the banks, of course, implies the power to govern them. And this equally, of course, requires the exercise of judgment upon matters of law and fact.

So long as the judicial power of the United States is not intrenched upon, it is within the power of the Congress to provide for the exercise of just such judgment.

But, *secondly*, although in this matter the Comptroller makes what if it were made by the judge of a court might be a judicial determination—that is to say, exercises judgment upon matters of fact and law—yet in this matter he does *not* make a *judicial determination*.

For that to be, there must be *actor*, *reus* and *judex*. Here *there is no judex*. The *actor* is *judex*, which is impossible, for no man can be judge in his own cause.

In other words, the Comptroller is the one contending party, and the stockholders the other. The parties are dealing at arm's length, and all the Comptroller really does is to make up his mind for how much he shall sue.

V.

The Act of Congress in question is not in conflict with the provision in the fifth amendment, that no person shall "be de- "prived of life, liberty or property with- "out due process of law."

1. In the first place, no person *is* "deprived" of anything. The Comptroller simply determines for how much he will sue.

2. If the determination did deprive somebody of some property, it would still be "due process of law."

Murray vs. *Hoboken Co.*, 18 How., 272, 283.
Nishimura Ekiu vs. *United States*, 142 U. S., 651, 660.
Fong Yue Ting vs. *United States*, 149 U. S., 698, 714.

VI.

The Act giving to the Comptroller the appointment of the Receivers is constitutional.

First.—The power which can create a corporation can also destroy it and provide for the administration of its assets.

Second.—The receiver in question is not in any way a judicial officer. His duties are purely executive.

Third.—The receiver appointed by a Court of Chancery is a simple custodian appointed because the Court, having in other ways acquired jurisdiction over certain property, must from necessity put a care-taker in charge of it.

It will hardly be held that every owner of property in the world must go to a Court of Chancery to have his property taken care of, and yet that is what the argument amounts to.

Chancery administers assets, either because of some contract made by the owner, or by reason of its jurisdiction over matters of fraud, not because administration of itself gives it jurisdiction.

Estates are administered quite as often by assignees as by receivers.

Fourth.—The receiver appointed by a Court of Chancery is not this receiver, nor anything like him. In fact, at the common law, there could not have been any such receiver, because on the death of a corporation there was not anything to receive. The real estate reverted to the grantors. The personal property went to the Crown and the debts were all extinguished.

Such a receivership is purely statutory, and all this is especially true of New York, to the law of which the counsel for the plaintiff in error particularly refers.

As early as 1817 Chancellor *Kent* held that the jurisdiction of his court did not extend to the sequestration of the property of corporations by means of receivers, or to the winding up of their affairs, and, substantially, that his court had no control over them.

> Attorney General *v.* Utica Insurance Company, 2 J. C. R., 371.

On the 23d of March, 1825, Attorney General *Talcott* applied to Chancellor *Sandford* for an injunction against

the Bank of Niagara, but Chancellor *Sandford* held as Chancellor *Kent* had previously held.

Attorney General *v.* Bank of Niagara, Hopk., 354, 596.

Mr. *Attorney* (2 Sand. Ch., 266) thereupon prepared the "Act to prevent fraudulent Bankruptcies by Incor- "porated Companies, to facilitate proceedings against "them, and for other purposes;" which was passed the "twenty-first of April of the same year." (Laws 1825, p. 448.)

Sections five and seventeen of that act are as follows:

"V. *And be it further enacted*, That whenever a judg- "ment shall be obtained at law against any incorporated "company, and an execution issued thereon shall be re- "turned unsatisfied in part or in the whole, it shall be law- "ful for the court of chancery, and for the several courts of "equity having jurisdiction, upon petition of the person "or persons obtaining such judgment, his or their repre- "sentatives, and upon due proof of the facts, to sequestrate "the stock, property, choses in action, and effects of such "company, and to appoint a receiver of the same, and to "distribute the same equally and in a just proportion "among the fair and honest creditors of such company; "and for that purpose, the said courts may compel a dis- "covery of such stock, property, choses in action, and "effects, by any officer, agent, or stockholder of such "company, or by any other person."

"XVII. *And be it further enacted*, That it shall and "may be lawful for the attorney-general of this State, and "it is hereby made his duty, whenever any incorporated "bank is insolvent and unable to pay its debts, or has "violated any of the provisions of the act incorporating "such company; and also it shall be lawful for any cred-

" itor of any such company to apply, by petition, to the " court of chancery, setting forth the facts and circum- " stances of the case; and upon its being proved to such " court that such company is insolvent, or that it has vio- " lated any of the provisions of the act incorporating such " company, or of any other act which shall be binding on " such company, it shall and may be lawful for such court " to issue an injunction to restrain such company and its " officers from exercising any of the privileges or fran- " chises granted by the act incorporating such company, " or by any other act, and from collecting or receiving any " debts, and from paying out, or in any way transferring " any of the monies or effects of such company, until " such court shall otherwise order; and it shall be lawful " for such court to appoint a receiver of the property, " monies and effects of said company, and to distribute " the same among the fair and honest creditors thereof."

In regard to this and subsequent legislation in New York, the Court of Appeals said in *U. S. Trust Co. v. N. Y. W. Sh. & B. Rw. Co.*, 101 N. Y., 478, as follows:

(P. 483) " It was held at an early day in this State, " that the jurisdiction of chancery did not extend to " the sequestration of the property of a corporation by " means of a receiver, or to the winding up of its affairs, " or to control or restrain the usurpation of franchises " by corporate bodies, or by persons claiming without " right to exercise corporate powers. (*Attorney-General* " *v. Utica Ins. Co.*, 2 Johns. Ch., 371; *Attorney-General* " *v. Bk. of Niagara*, Hopk., 354.) The refusal of the " Court of Chancery to entertain jurisdiction of corporate " bodies, at the instance of creditors, or to wind up their " affairs in case of insolvency, led to the enactment by the " legislature in 1825, of the act chapter 325 of the laws of that " year, entitled ' An Act to prevent fraudulent bankrupt- " ' cies of incorporated companies, and to facilitate pro-

" ' ceedings against them,' etc. By this act jurisdiction " was conferred upon the Court of Chancery to sequestrate " the property of a corporation, upon the application of a " judgment creditor, after the return of an execution " unsatisfied, and to appoint a receiver of its property " (§ 15*), and in case of an incorporated bank, which had " become insolvent, or had violated its charter, it author- " ized the Court of Chancery, upon the petition of the " attorney-general, or of a creditor, to proceed by injunc- " tion and to appoint a receiver of the property of the " bank, and to distribute the same among its creditors, " (§ 17). The provisions of the act of 1825, enlarged and " extended, were incorporated into the Revised Statutes, " in the article entitled ' Of proceedings against corpo- " ' rations in equity ' (2 R. S., 462), and a complete " statutory system was enacted for the winding up of the " affairs of a corporation against which an execution had " been returned unsatisfied, at the instance of the creditor " in the execution, and for similar proceedings against " insolvent banking or other specified corporations, at the " instance of the attorney general, or any creditor or stock- " holder (§§ 36, 39, 40, 41). The court was authorized " to appoint receivers of the corporate property. Their " powers and duties are specified in the statute in great " detail, and it is declared that receivers so appointed " shall be ' vested with all the estate, real and personal, " ' of such corporation.' and they are declared to be " ' trustees of such estate, for the benefit of the creditors " ' of such corporation, and its stock holders,' (2 R. S., " 469, §§ 67, 68). The system inaugurated by the Act of " 1825, and incorporated into the Revised Statutes, has " been continued by the Codes, and for fifty years prior " to the Act of 1883, had been the statutory system of " procedure for the winding up of the affairs of insolvent

[*§ 5.]